The Central Law Journal.

SAINT LOUIS, JANUARY 31, 1879.

CURRENT TOPICS.

In *McClure v. State*, recently decided by the Supreme Court of Pennsylvania, the issue of a counterfeit medical diploma was held to be forgery. The defendant, who, it seems, had carried on a considerable business in counterfeit diplomas, sold to one Standin, for the price of $120, the following instrument:

"*Ars Veterinaria post Medicinam Secunda est.* Veterinary College of Philadelphia. To all whom it may concern. Know ye, that we, the officers and professors of the Veterinary College of Philadelphia, do, by the authority vested in us by the sovereign power of the State of Pennsylvania, confer the degree of Doctor of Veterinary Medicine and Surgery, with all the attending immunities consequent thereon, upon Francis Standin, he having attended the curriculum of studies, and complied with all the requirements imposed by the laws of our institution. And we hereby certify his entire ability to treat, in a scientific manner, all kinds of diseases peculiar to veterinary practice.

In testimony whereof, we have granted him this diploma, on this first day of March, Anno Domini, 1877, in the hall of our College, at Philadelphia, affixing our signatures, and the seal of the college thereto.

ALFRED L. ELWYN, M. D., President.
GEO. W. ORLESS, V. S., Secretary.
ROB'T. MCCLURE, M. D., V. S.
[SEAL.] JOHN H. GOULD, V. S."

The names appended were written at the defendant's instance by one Warren. The Pennsylvania act under which the defendant was convicted contains this provision. Purd. Dig. 379-80, p. 20: "It shall be sufficient in any indictment for forging, altering, offering, disposing of, or putting off, any instrument whatsoever, or for obtaining, or attempting to obtain, any property, by false pretenses, to allege that the defendant did the act with intent to defraud; without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offenses in this section mentioned, it shall not be necessary to prove any intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud." In affirming the conviction, the Supreme Court say: "Here is a positive statute which says you need not charge or prove an intent to defraud any particular person, but it shall be sufficient to charge and prove a general intent to defraud. Did the legislature mean what it said in this act? Who can doubt it? What was the purpose? Clearly to meet those frauds which affect the public at large. If a man forge bank notes, bonds to bearer, or other documents, intended to deceive the public, and make money out of the imposture, on what principle is this a less offense than if he intended to cheat a single individual? He often does not circulate them himself, but sells them, at a per centage on their face, to accomplices who circulate them to the injury of the public. Such a counterfeiter is far more dangerous to society than the 'shover,' as he is called, of the bills or counterfeit papers. * * * The case before us is a clear one. The defendant procured a certain diploma, to be fraudulently and falsely signed with the names of certain persons as the officers of a once existing institution authorized to grant degrees. He sold this diploma to a person named Standin for $120, after a correspondence on the subject, resulting in the price named. Standin, it is true, was engaged to trap the defendant and he was not deceived. But not so the defendant; he sold the forged diploma in order to make money out of it, and thereby intended to defraud any and every one putting trust in it as evidence of the skill and knowledge of the person named in the diploma. He fell directly within the words and intent of the 19th section referred to; he had a fraudulent intent in his act; his purpose was corrupt and injurious, and this, the law says, shall be sufficient; and it shall not be necessary to prove any intent to defraud any particular person. No one can doubt the fraud such a document is intended to perpetrate, or the intent to defraud, that the forger had when he got it up and used it. It is just such a case as the law intends to reach. A general intent is quite as injurious to the public as an intent to defraud a particular person."

The right of a United States marshal to seize property outside of his district under bankruptcy proceedings commenced within it, was denied by the Supreme Court of Michigan, in *Carr v. Phillips*, lately decided by that court, where a provisional warrant to take possession of certain property was held

to be no protection to such officer for a seizure outside of his district. The court said: "In the brief submitted by the counsel for plaintiff in error, it is conceded that, under sec. 787, p. 147, Rev. Stats. of the United States, which prescribes the duties of marshals, that the authority there conferred is to execute throughout their district all lawful precepts directed to them and issued under the authority of the United States. This, it is claimed, is but the general authority, and is not intended to point out what may or may not be done by him in special cases. It is not claimed by counsel that this section conferred any authority to make the seizure in question. The claim made is that Congress has power to authorize the marshal as messenger of the bankrupt court to execute its process anywhere in the United States; that Congress has in this respect the same power, that the legislature of a State has, to say that a sheriff may serve process of a circuit court outside of the county from which the process issues. Counsel does not claim that Congress has in express terms conferred any such authority, but rather that such authority follows as a necessary and legal implication from other powers expressly conferred; that in order to fully carry out the provisions of the bankrupt act, and in order to protect and preserve the property of the bankrupt for the assignee, it is necessary that the marshal should have this authority. We can not concur with counsel in the view that such authority will be implied in order to protect the property for the assignee. Sec. 5046 prescribes that property of the bankrupt shall vest in the assignee, and it is declared that property conveyed by the bankrupt in fraud of his creditors shall at once vest in the assignee, and the assignee may commence and maintain an action for such property, and is not confined to the district in which he was appointed in so doing. To give the marshal the power claimed for him would enable him to follow property which it was claimed had been by the bankrupt sold in fraud of his creditors, all over the United States, to seize it and carry in into the district where the bankrupt resided, and the bankruptcy proceedings were pending. This would require the claimant to follow the property if he desires to protect his title thereto, and submit to the jurisdiction of a court, at an expense and loss ruinous even in case of success. If it could unerringly be said that all sales claimed to have been so made were fraudulent in fact, and that the claimant acquired no interest or right entitled to protection, there might be less hardship in this view. But the law does not proceed upon any such theory. We have not been referred to any provision in the acts of Congress, or to a judicial construction of any provision which protects the officer making the seizure in this case, and in the absence of such he had no authority. The seizure having been wrongfully made in a county where the warrant was but waste paper, and wrongfully removed to and detained in an adjacent county, the warrant under those circumstances could afford no justification for the detention. The property could not thus be brought within the jurisdiction of the writ. Craig v. Grant, 6 Mich. 455. Express authority is given marshals of the United States to transfer, keep and sell property outside their districts in like manner as if the property were within the same, Rev. Stats., sec. 4620, p. 908. See also sec. 775, p. 145, *et seq.*, where marshals of one district are authorized to perform duties in others. Other instances may be found where Congress, deeming an enlargement of the powers necessary, has conferred the same in express terms. In the absence of any construction by the courts of the United States giving marshals the authority claimed in this case, under the bankrupt laws, we think it safer and more in accord with well settled legal principles to hold that they have no such authority."

LIABILITY OF EXECUTOR OR ADMINISTRATOR FOR THE ACTS OF A CO-EXECUTOR OR CO-ADMINISTRATOR.

Whatever may be the rights of creditors, an executor as against legatees is always protected in following the directions of the testator; for the legatee can only claim his legacy by and under the will.[1] If the will, therefore, expressly provides that an executor may purchase at a public sale of the property, and that his co-executor shall execute a deed to him for the same, the latter is not liable to legatees for a loss of the purchase money in the

1. Brown's Appeal, 1 Dall. 311.

hands of the latter.[2] If the will directs that one of the executors shall have possession of the property, a co-executor is not liable for a misapplication thereof, unless he fraudulently consented to the mismanagement[3] If one executor, who alone has the power to sell real estate, employs his co-executor to make the sale, and the latter, after making the sale and receiving the money, turns it over to the former, he is not liable for the former's defalcation; for in such a case he acts merely as his agent to make the sale, and not as executor.[4] If the assets consist of bonds or other securities that are kept in a box which is under the control of both executors, each executor is bound to use reasonable diligence to prevent loss. If one has the key, and the other the box, and the former unlocks it and sends the securities to the latter, who receives the money thereon, he is responsible if the money is not properly applied.[5] But he will not be liable in such a case if both have a key, for his act is not necessary in order to enable the other to obtain possession of the securities.[6] If the box is deposited in bank in the joint names of both, and is withdrawn by them jointly, so that one of them may exchange the securities therein for others, the other is liable if he does not use due diligence to ascertain that the box contains the proper securities when it is returned to the bank.[7] But if the box remains in bank, and one of them, under pretense of cutting the coupons off, so abstracts the securities, the other is not liable if he uses due diligence to recover them.[8] If the executors, having a fund in their joint possession, divide it, one is responsible for any misapplication by the other of his share.[9] If they hold the fund jointly, one is not relieved from responsibility for an act that is an exercise of power over the money by the mere fact that he acted upon a false representation made to him by the other; but he is bound to ascertain that the act is necessary for the purposes of the will, and to use ordinary and reasonable diligence to find out whether or not the representation is true.[10]

2. Fennimore v. Fennimore, 3 N. J. Eq. 292.
3. Vanpelt v. Veighte, 14 N. J. 207.
4. Davis v. Sparling, 1 Rus. & Mylne, 64.
5. Candler v. Tillett, 23 Beav. 257.
6. Candler v. Tillett, 23 Beav, 257.
7. Mendes v. Guedella, 5 J. & H. 250.
8. Mendes v. Guedella, 2 J. & H. 259.
9. Ducommun's Appeal, 17 Penn. 268.
10. Shipbrook v. Hinchinbrook, 11 Ves. 252; s. c., 16 Ves. 477.

An executor is responsible for the assets which he actually receives, although he received them from his co-executor.[11] If a legatee, knowing that one executor has received the assets from the other, so far acquiesces in the transfer as to authorize it as much as the other, he thereby waives all right to hold the other responsible for any loss that may subsequently occur.[12] Whether there is a waiver or not depends on the circumstances of each particular case. In order to be effective as a waiver, there must be either a concurrence in the transfer, or a subsequent acquiescence. If there is no concurrence in it, then the subsequent acquiescence, in order to operate as a release, must be a consent on the part of the *cestui que trust* to absolve one executor from liability and adopt the transfer of the fund as having been done under the assent and sanction of the legatee.[13] If a *feme covert* is a legatee, the knowledge and consent of her husband will not bind her.[14] If one executor is held responsible for funds transferred by him to his co-executor, he is entitled to an allowance for all moneys actually used by the latter to pay debts or legacies.[15]

Mere concurrence in such acts as are absolutely necessary for the proper administration of the estate, will not render one executor responsible for the defalcation or misconduct of his co-executor,[16] and on the other hand, if the acts are not necessary and proper, then he may, in some instances, be so liable.[17] Merely signing a joint inventory,[18] or a joint report of sales,[19] will not, of itself, render one executor responsible for the property or the proceeds, if the other has the sole and exclusive possession thereof. But such a joint inventory, or report, is *prima facie* evidence of a joint liability, so as to render each responsible for the

11. Edmonds v. Crenshaw, 1 Harp. Eq. 224; James Daly's Estate, 1 Tuck. 95.
12. Langford v. Gascoyne, 11 Ves. 333; Bank v. Wilkes, 3 Sandf. Ch. 99; Ray v. Doughty, 4 Blackf. 115.
13. Burrows v. Walls, 5 D. M. & G. 233.
14. Underwood v. Stevens, 1 Mer. 712.
15. Shipbrook v. Hinchinbrook, 11 Ves. 252; s. c., 16 Ves. 476; Underwood v. Stevens, 1 Mer. 712.
16. Hovey v. Blakeman, 4 Ves. 596.
17. Terrell v. Matthews, 1 Mac. & G. 433, note; s. c., 11 L. J. Ch. 31.
18. Ochiltree v. Wright, 1 Dev. & Bat. Eq. 337; Williams v. Maitland, 1 Ired. Eq. 92; Hall v. Carter, 8 Geo. 388; Stearn v. Mills, 4 B. & A. 657; Graham v Davidson, 2 Dev. & Bat. Eq. 155,
19. Ochiltree v. Wright, 1 Dev. & Bat. Eq. 331; Williams v. Maitland, 1 Ired. Eq. 93; Gaultney v. Nolan, 33 Miss. 569.

whole fund, unless he can show that it came into the hands of his co-executor alone.[20] The presentation and allowance of a joint account is also *prima facie* evidence of a joint liability.[21]

The giving of a joint receipt is *prima facie* evidence of a joint liability for the money; but this presumption may be rebutted by proof that the joint receipt was given as a mere matter of form, so as to make him who received the money the only one liable.[22] The same principle applies to the joint release of a mortgage belonging to the estate.[23] It has also been held that the giving of a joint receipt and the division of the money between them will not make one responsible for a misappropriation by the other.[24] But if the joint receipt is given under circumstances purporting that the money, though not actually received by both, is under the control of both, then the receipt will charge both; for it amounts to a direction on the part of the one who does not receive the money to pay it to his co-executor.[25] If both unite in the release of a mortgage and the receipt for the money, which is left in the hands of one alone without investment, when the will requires that all funds shall be invested in government securities, the other is responsible, if the money is lost through the insolvency of his co-executor.[26]

If money is needed for the payment of debts or legacies, an executor who joins in a sale or other disposition of the assets, for that purpose only, is not responsible for the defalcation or misconduct of his co-executor if the latter receives all the money.[27] If the sale is not necessary, or is contrary to the intention of the testator, then each is responsible for any misappropriation of the proceeds by the other.[28] A representation by the one who receives the proceeds that the sale is proper is not in such case sufficient of itself to protect the other from liability.[29] If the sale is made under an order of court with leave to the executors to purchase at the sale one is not liable for a loss arising from a purchase by the other, who afterwards absconds without paying the money.[30] If the testator in his lifetime sent a bill of exchange to two persons with directions for investment, and subsequently appointed them executors, a joint indorsement, merely to enable one to get the money, will not render the other liable for a misappropriation by the one who receives it.[31] If the very act of disposing of the assets amounts to a misapplication of them, then the executors are jointly liable for any loss that may accrue therefrom. If, for instance, both unite in drawing a draft on a debtor in favor of a firm of which one of them is a member,[32] or, having made a sale, take a covenant from the purchaser for the payment of the purchase money, with a stipulation that all debts that may be due from either of them shall be credited as payments thereon,[33] both are responsible for any loss that may arise from the insolvency of either. If both unite in a sale, and a direction that the proceeds shall be paid to a legatee, both are liable if that is a misapplication, although one of the executors is the legatee to whom the money is paid.[34]

If the executors unite in selecting an agent, they are liable jointly for misconduct on his part for which they are responsible.[35] How far one is responsible for the acts of the other, when they unite in selecting an agent, is a question on which the authorities differ. In one case they employed a solicitor to prepare a release of a mortgage which they both executed, and he, upon receiving the money, paid it to one alone who misapplied it. The other was held responsible for the money.

20. Graham v. Davidson, 2 Dev. & Bat. Eq. 155.
21. Doebler v. Snavely, 5 Watts, 225; Duncommun's Appeal, 17 Penn. 268; Hengst's Appeal, 24 Penn. 413; *Vide* Wilson v. Fisher, 5 N. J. Eq. 493: Fennimore v. Fennimore, 3 N. J. Eq. 292; Laroe v. Douglass, 13 N, J. Eq. 308; Schenck v. Schenck, 14 N. J. Eq. 174.
22. Westley v. Clark, 1 P. Wms. 83, note: s. c. 1 Eden, 357; Harden v. Parsons, 1 Eden, 145; Joy v. Campbell, 1 Scho. & L. 328.
23. Westley v. Clarke, 1 P. Wms. 83, note; s. c., 1 Eden, 357.
24. Nettman v. Schramm 23 Iowa, 521.
25. Joy v. Campbell, 1 Scho. & L. 328; Stewart v. Conner, 9 Ala. 803.
26. Scurfield v. Howes, 3 Bro. C. C. 90.
27. Terrell v. Matthews, 1 Mac. & G. 433, note; s. c., 11 L. J. Ch. 31; Hovey v. Blakeman, 4 Ves. 596; Atcheson v. Roberts, 3 Rich. Eq. 132.
28. Matthews v, Matthews, 1 McMullan Eq. 410; Murrell v. Cox, 2 Vern. 570; Aplyn v. Brewer, Prec. Ch. 173; Johnson v. Johnson, 2 Hill Ch. 277; Evans v. Evans, 1 Dessau, 515; Williams v. Nixon, 2 Beav. 472; Chambers v. Minchin, 7 Ves. 186.
29. Underwood v. Stevens, 1 Mer. 712,
30. Lenoir v. Winn, 4 Dessau. 65.
31. Hovey v. Blakeman, 4 Ves. 596.
32. Sadler v. Hobbs, 2 Bro. C. C. 114.
33. Hauser v. Lehman, 2 Ired. Eq. 594.
34. Carey v. Barsham, 1 Scho. & L. 344.
35. Brown's Accounting. 16 Abb. Pr. N. S. 457.
36. Cowell v. Gatcombe, 27 Beav. 568.

But in another case they appointed an agent to collect money, and he gave to each his proportion, and one was held not to be liable for the other.[37]

If the administration is joint, each becomes surety for the other and is responsible for the proper administration of the whole estate.[38] Whether the administration is joint or several depends on the facts of each particular case. If, by an agreement amongst themselves, one is to receive and intermeddle with such a part of the estate, and another with such a part, each of them will be chargeable with the whole, because the receipts of each are pursuant to the agreement made between both.[39] They are also jointly liable if they agree that one shall receive the whole estate, and pay the debts and legacies.[40] If they appoint one as acting executor, and give him authority to manage the whole estate, they are jointly liable.[41] If both unite in the misapplication of the assets, each is liable for the whole.[42] Although executors may be jointly liable to creditors and legatees in an action at law, yet in a court of equity as between themselves, each is liable only for what is in his own hands. He is in such a case liable for what is in the hands of the other, but not in the first instance nor as if in his own hands. He is responsible for the other and after him. They stand as reciprocal sureties for each other. Each is ultimately liable for the other, but only in case the decree can not be made effective against the other.[43] If the accounts are kept so loosely as to make it impossible to determine in whose hands particular assets are, each is liable equally; that is, for one-half in the first instance, and ultimately for the other half, if not obtained from the co-executor.[44] If an executor is compelled to make good a defalcation of a co-executor, he is entitled to a contribution from the other executors, unless he has been guilty of some negligence, remissness, or improper conduct by which the co-executor was enabled to waste the assets.[45] An acting executor is not liable beyond the others for the defalcation of a co-executor, unless he acts improperly in his agency, and permits the loss through his own negligence.[46]

Executors, when required by law to give bond for the faithful performance of their duties, may give it severally or jointly. If they give a joint bond, they are jointly liable as sureties for each other to creditors and legatees.[47] The relation which each sustains to the sureties on the bond is not that of co-surety, but that of principal. Each is responsible for the other to the sureties, and as long as either of them is able to make good any defalcations for which they are liable under the bond, he is so held in preference to the sureties.[48] If a surety, therefore, is compelled to pay money on account of the defalcation of one executor, he may recover it from the co-executor.[49] As an executor is liable as principal and not as co-surety, it would seem to be the better doctrine that his liability ceases upon his removal[50] or death,[51] so that neither he nor his heirs, nor his personal representatives, can be held responsible for a defalcation that occurs after his connection with the estate has ceased. While he remains executor, he may watch over the conduct of the others, and institute proceedings to prevent any misconduct. But upon his death or removal, the whole power devolves upon the other, and neither he

37. Champneys v. Browne. 1 Barnes' Notes Cas. 440.

38. Hovey v. Blakeman, 4 Ves. 596; Kincade v. Kincade, 64 N. C. 387; Fonte v. Horton, 36 Miss. 350; St. Andre v. Rachal, 3 La. An. 574; Roberts v. Thomas, 32 Geo. 31.

39. Gill v. St. Gen. Hardr. 314.

40. Lincoln v. Wright. 4 Beav. 427; Egbert v. Butler, 21 Beav. 560.

41. Lees v. Sanderson, 4 Sim. 26; Doyle v. Blake, 2 Scho. & L. 229.

42. Hargthorpe v. Milforth, Cro. Eliz. 318; Sutherland v. Brush, 7 John Ch. 17; Worth v. M'Aden, 1 Dev. & Bat. Eq. 199.

43. Brotten v. Bateman, 2 Dev. Eq. 115; Johnson v. Corbett, 11 Paige, 265; Massey v. Cureton, 1 Cheves Eq. 181; Gazden v. Gazden, 1 McMullan, Eq. 435.

44. Brotten v. Bateman, 2 Dev. Eq. 115.

45. Marsh v. Harrington, 18 Vt. 150.

46. Marsh v. Harrington, 18 Vt. 150.

47. Sparhawk v. Buell, 9 Vt. 41; Newton v. Newton, 53 N. H. 537; Little v. Knox, 15 Ala. 576; South v. Hoy, 3 T. B. Mon. 88; Pearson v. Darrington, 32 Ala. 227; Lucas v. Guy, 2 Bailey, 403; Anderson v. Miller, 6 J. J. Marsh, 568; Gazden v. Gazden, 1 McMullen Eq. 435; O'Neall v, Herbert, 1 McMullan Eq, 497; Moore v. State, 49 Ind. 558.

48. Boyd v. Boyd, 1 Watts, 365; Babcock v. Hubbard 2 Conn, 536; Hughlett v. Hughlett, 5 Humph. 453; Newcomb v. Williams, 50 Mass. 525; Ames v. Armstrong, 106 Mass. 15; Newton v. Newton, 53 N. N. 537; Bostick v. Elliott, 3 Head. 507; Prichard v. State, 34 Ind. 137; Dobyns v. McGovern, 15 Mo. 662; Overton v. Owens, 17 Mo. 453; *contra*, Morrow v. Peyton, 8 Leigh. 54; Collins v. Carlisle, 7 B. Mon. 13.

49. Babcock v. Hubbard, 2 Conn. 536; Overton v. Owens, 17 Mo. 453.

50. Marsh v. People, 15 Ill. 284.

51. Brazer v. Clark, 22 Mass. 96; Towne v. Ammidown, 37 Mass. 537; *contra*, Clark v. State, 6 G. & J. 288; Dobyns v. McGovern, 15 Mo. 662; Braxton v State, 35 Ind. 82; Prichard v. State, 34 Ind. 137.

nor his representatives nor his heirs can control the conduct of the latter, or take the funds from his custody. Although the bond is joint, yet in equity each is treated merely as surety for the other.[52] If the *devastavit* was committed by one only, a declaration in an action on the bond should so allege, and should not allege a joint *devastavit*.[53]

In regard to the liability of executors for the acts of each other, there is a distinction between creditors and legatees. Creditors have claims upon the estate which the testator can not defeat or set aside, nor can he give any latitude of discretion whatever to his executors to their prejudice. The law lays down the rule in that respect, by which the executors are to govern themselves. But after his debts are paid out of his estate, the testator can dispose of the residue as he pleases, and prescribe the course that the executors shall pursue in the administration of it. In short his will, so far as it can be discovered, may be considered their guide and protection, and hence, as long as the executors manage the estate in accordance with the ideas and notions which the testator himself entertained, and do nothing but what there is reason to believe he would have approved had he been consulted, they are not responsible to legatees.[54] But if there is no provision in the will to make the difference, there is no distinction between creditors and legatees.[55]

When the administration is several, notice to one executor is not notice to the co-executor, so as to render the latter liable for misconduct. Notice of a specialty debt to one is not notice to the other, so as to affect him with a *devastavit* by subsequently paying a simple contract debt.[56] If one takes an assignment of a legacy and then dies, his knowledge is not notice to the other so as to render a subsequent assignment of the same legacy to another who gives notice thereof to the surviving executor void.[57] One executor is not personally liable for a misrepresentation made by his co-executor in selling a part of the estate.[58]

The ordinary exemption clause, which makes each liable only for his own acts or defaults, and not for those of the other, will not relieve them from liability for a joint act.[59] O. F. B.

52. Lenois v. Winn, 4 Dessau, 65; Kuox v. Picket, 4 Dessau, 92.
53. Cameron v. Justices, 1 Geo. 36.
54. Churchill v. Hobson, 1 P. Wms. 241; Brown's Appeal, 1 Dall. 311; Vernee's Estate, 6 Watts, 250; Westley v. Clark, 1 Eden, 357; s. c., 1 P. Wms. 83, note; Doyle v. Blake, 2 Scho. & L. 229.
55. Johnson v. Johnson, 2 Hill Ch. 277.
56. Hawkins v. Day, Ambl. 162; s. c., 1 Dick. 157.
57. Tinson v. Ramsbottom, 2 Keen. 35.
58. Heath v. Allin, 1 A. K. Marsh, 442.
59. Mucklow v. Fuller, Jac. 198; Williams v. Nixon, 2 Beav. 472.

EXEMPTION —CONSTRUCTION OF TERMS "OTHER ARTICLES AND NECESSARIES" AND "WEARING APPAREL,"

IN RE STEELE.

United States District Court, Western District of Tennessee, January 11, 1879.

Before HAMMOND, District Judge.

A watch of small value, necessary in the business of a commercial man, *held* properly allowed to the bankrupt as a necessary article. The words "other articles and necessaries," and "wearing apparel," as used in the bankrupt law, construed.

HAMMOND, J.:

By agreement between the assignee and the bankrupts, the question is submitted for the opinion of the court, as if on certificate of the register, whether or not the refusal of the assignee to allow them each his gold watch as exempt property, is proper under the circumstances set out in the agreement of facts. John Steele has been allowed, and claims no exemption except this watch, which is described as "a plain, old style single-case gold watch, which he has owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." R. L. Steele has been allowed household furniture worth not more than one hundred dollars. The kind and value of his watch is not stated.

The decisions on this subject are conflicting. I have examined a good many cases on the general subject, and find that the conflict grows out of the diverse views as to whether the particular articles claimed are necessaries or luxuries, useful or only ornamental. It is said in Montague v. Richardson, 24 Conn. 338, that each case must depend upon its own peculiar circumstances. I think this is a correct view, and that in some cases the assignee may and should allow a watch or other time-piece, and in others he should not. These parties were a firm of merchants, and their valuable assets had been surrendered to their creditors. They proposed to engage again in commercial pursuits. It was held in Harrison v. Mitchell, 13 La. Ann. 260, that a desk and iron safe were exempt as necessary implements, to carry on the business of a commercial man.

It would not be doing any great violence to the

meaning of the term "wearing apparel," as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel shall be exempt, except watches." Ark. Dig. 503, 504; James' Bankruptcy, 58; Avery & Hobbs' Bankr. 68. In Peverly v. Sayles, 10 N. H. 356, under a statute which exempted "wearing apparel necessary for immediate use," it was held that an overcoat and a suit of clothes "to go to meeting in" were included. In Ordway v. Wilbur, 16 Me. 263, cloth sent to a tailor to be made into clothes was in that form held to be exempt as "apparel."

In Bumpus v. Maynard, 38 Barb. 626, the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as "wearing apparel," notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as "wearing apparel," but it is probable they did. It was decided in Smith v. Rogers, 16 Ga. 479, that a watch was not wearing apparel. But in Mack v. Parks, 8 Gray, 517, it was held, in a case where an officer with an attachment asked the debtor to let him look at his watch, and being permitted tore it from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. See Freeman on Ex., sec. 232.

We have no State statute in Tennessee, that I can find, exempting wearing apparel, and we depend on this common law principle for immunity in such cases. It is said in Richardson v. Duncan, 2 Heisk. 220, that our exemption laws are to be liberally construed, and this is the universal doctrine of modern times. In that case it was held that an "ass" is included in the statute which exempts "a horse, mule or yoke of oxen;" and in Webb v. Brandon, 4 Heisk. 285, an ox-wagon is included in the description—"one two-horse wagon."

But, whether a watch may be included in the statutory exemption of "wearing apparel" or not, it certainly may be allowed as "other necessaries" under certain circumstances.

The act (Rev. Stat. 5045) says: "There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars." Under this clause the late Judge McDonald, of the District of Indiana, held in *re* Thiell, 4 Biss. 241, that a cheap watch might be included, but the same learned judge held in *re* Cobb, 1 N. B. R. 414, that mere articles of luxury and ornament, such as watches, pianos, and the like, should not be allowed. In *re* Graham, 2 Biss. 449, Hopkins, J., refused to allow watches. Some other cases, cited in the district courts, where the identical question has been considered, have not been accessible for examination; but I presume, as in these cases, they all turn on the question whether or not the particular watch, under the circumstances, was an article of necessity only, or an article of luxurious ornament, in which too much money had been invested to allow it in justice to the creditors. It will be found in all the cases where the law does not exempt *the article itself*, when value is immaterial, that this question of the reasonable or unreasonable value of it controls the case. The question is to be determined not solely by an appraisement of the particular article, but also by the attendant circumstances, or, as this statute puts it, "having reference in the amount to the family, condition, and circumstances of the bankrupt." The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion, subject to the final decision of the court, in the exercise of its supervising power, *Re* Feely, 3 N. B. R. 66; *re* Thiell. 4 Biss. 241.

The phrase "other articles and necessaries" is a comprehensive but indefinite expression, and I have been at pains to discover the principle that is to direct the assignee and the court in the exercise of the discretion. This act is framed like other exemption acts, and, doubtless, with full knowledge of the adjudications of the State courts under similar statutes. In Leavitt v. Metcalf, 2 Vt. 342, the statute exempted "such suitable apparel, bedding, etc., and articles of household furniture as may be necessary for upholding life." It was held that "one brass time-piece" was included, and the court say there were two former decisions exempting the "debtors' only time-pieces," but they are not cited. "It must be admitted," say the court, "that there is a great convenience in a family having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word 'necessary,' or 'necessaries' has ever been considered, in legal language, to extend to things of *convenience and comfort*, and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence." An instructive case is that of Hitchcock v. Holmes, 43 Conn. 528, where it is said we may "pass beyond what is strictly indispensable, and include articles which, to the common understanding, suggest ideas of comfort and convenience. But having done this, the obligation is upon us to exclude all superfluities and articles of luxury and ornament." Certain expensive furniture, including a costly clock, were, therefore, excluded; but a dissenting judge thought the clock should have been allowed. A piano was thought to be a luxury, because "it is not an article of mere comfort, and does not minister to a want universally felt." Dunlap v. Edgerton, 30 Vt. 224. In Garrett v. Patchin, 29 Vt. 248, it was said the term neces-

saries means that which is convenient or useful—which a man procures for his own personal use, unless extravagant." And see Montague v. Richardson, 24 Conn. 338, which cites McCullough v. Maryland, 4 Wheat. 316; Davlin v. Stone, 4 Cush. 359, which says "the articles may be of that plain and cheap character which, while not indispensable, are to be regarded amongst the necessaries of life, as contradistinguished from luxuries." See, also, Wilson v. Ellis, 1 Denio, 462, and *re* Thornton, 2 N. B. R. 189. Guided by these humane and liberal principles of construction, I should say that to a commercial man a plain, and not extravagantly costly watch, such as this bankrupt owns, is, in the quaint language of the Vermont statute, "necessary for upholding life." The watch of John Steele should be allowed. As to the other I can not determine, its value not being stated. If the parties can not agree, they may have leave to make further application in the matter.

EFFECT OF CONFUSION OF PROPERTY.

JEWETT v. DRINGER.

Court of Errors and Appeals of New Jersey, November Term, 1878.

1. IF A PARTY HAVING CHARGE of the property of others, so confounds it with his own that the line of distinction can not be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it.

2. A JUNK DEALER, BY FRAUDULENT COLLUSION with the employees of a railroad corporation, obtained large quantities of old iron, etc., at much less than the actual weight or value. On delivery it was thrown indiscriminately on other heaps of old iron, etc., belonging to him, so as to be indistinguishable. *Held*, that he must forfeit the whole mass to the company.

On appeal from a decree of the vice-chancellor, reported in Jewett v. Dringer, 2 Stew. 199.

Mr. R. Wayne Parker and *Mr. Cortlandt Parker*, for appellant; *Mr. T. N. McCarter* and *Mr. S. Tuttle*, for respondents.

DODD, J. delivered the opinion of the court.

Hugh J. Jewett, the complainant in this suit, was appointed, in May, 1875, receiver of the Erie Railway Company, and as such filed his bill of complaint, in April, 1876, as against the defendants, Sigmund Dringer and Henry Bowman. Dringer was a junk dealer in the city of Paterson, and began, in April, 1873, to buy, of the company, old iron or waste material, and continued so to do within a few days before the filing of the bill. The defendant, Bowman, was the company's purchasing agent, and had also the further duty of making sales of the waste materials, of which large quantities were constantly being accumulated at the company's shops in Jersey City, Susquehanna, Elmira, and elsewhere. The bill charged both defendants with fraud in these purchases of Dringer, alleging in particular one transaction in which seventeen hundred tons of old car wheels were obtained for nineteen dollars per ton, instead of twenty-two dollars per ton and, further, alleging in general that large amounts of material had been delivered to Dringer fraudulently, by the connivance of Bowman, of which no account had been rendered to the company, and for which nothing had been paid. Discovery and account were prayed for from both defendants; also a writ of *ne exeat* against Bowman and an injunction against Dringer restraining him from disposing of such material. Both writs were issued on the filing of the bill and affidavits. The answer of Dringer was filed April 25th, 1876.

On the 4th of May, 1876, a petition was filed by the receiver, setting forth that discoveries of additional fraudulent transactions had been made since the filing of the bill, specifying the same, and praying that a receiver might be appointed to take possession of the material in Dringer's yards, and, on the 24th of the same month, E. N. Miller was appointed such receiver. Upon arguments afterwards had before the chancellor on the several answers of Bowman and Dringer, the writ of *ne exeat* was discharged, and the motion on behalf of Dringer to have the injunction and receivership set aside, was denied. Afterwards, and before the taking of the evidence, the bill of complaint was amended, and new answers were filed by the defendant.

The matters of fact asserted by the complainant, and to which the evidence was directed, are included in the general statement, that the defendant, Dringer, obtained from the employees of the company, under the pretense of purchases, large quantities of waste material far beyond the amounts actually purchased, and also that, under the pretence of purchasing one class of material, he possessed himself of another class, superior in quality and value to that accounted for, thus defrauding the company both in the weights and the character of the material obtained; and that Bowman, during the time he was purchasing agent, was the principal one of the company's employees responsible for the fraud.

The material in question consisted of old iron, brass, copper, lead, zinc and white metal. Of some of these there were several varieties, differing in solidity and value; such as car-wheels, axles, tires, grate-bars, castings, machinery, boiler-scrap, tanks, ash-pans, etc. A large part of what was obtained by Dringer was denominated *wrot* scrap, which is also classified under several heads in quality and value. The material said to have been fraudulently obtained by Dringer came almost entirely from the company's shops at Susquehanna, though material purchased by him was sent also from the shops at Jersey City, Elmira and Port Jervis. The goods were sent in the company's cars, loaded and weighed at the shops by the company's employees. The cars are open boxes of nearly uniform size. At Susquehanna the employee who marked in the yard the weight of the car before and after being loaded, took his memorandum thereof to the store-room and entered the weights in the blotter, from which another employee made up the shop-book. Bills of the same as vouchers were then made and sent to the purchaser or con-

signee, stating each car by its number, the weight of its contents in pounds, the several kinds of material, the price of each, and the aggregate amount.

The defendant Bowman, during his agency, had no supervision of the weighing or loading, his duty being that of bargaining with the purchaser, and afterwards giving directions for delivery at the shops from which the goods were to be shipped.

From April, 1873, to April, 1876, Dringer, as appears from his books of account, purchased and received from the company material weighing in all 18,810,953 pounds, or about 8,400 gross tons of 2,240 pounds each. The complainant asserts that, besides this amount shown by the defendant's books of account, he received over four millions of pounds, or about two thousand tons, of which no account was rendered, and for which nothing was paid. Before the filing of the bill he had paid the company more than $150,000. His answer admits an existing indebtedness of $35,646.97. The complainant asserts the true balance to be three times the admitted one.

The testimony and exhibits on both sides produced before the vice-chancellor are unusually voluminous, covering in all nearly two thousand two hundred printed pages. Ninety-eight witnesses were examined for the complainant and eighty-three witnesses for the defendants. The question of fact to be settled is the question of fraud.

* * * * * * *

While differing with the vice-chancellor as to the fullness and cogency of the proofs against Dringer, I agree with him in thinking that, as against the defendant Bowman, the allegations of the complainant inculpating him with his co-defendant, have not been maintained, and that, as to him, the bill should be dismissed. A sale to Dringer of 1,700 tons, the transaction specially set out and charged to be fraudulent in the original bill, is not proved to be so by the evidence, which, in its bearing upon him, does not call for review. Whatever criticisms it may suggest, it does not warrant the adjudication of intentional wrong.

As to Dringer, the case is one of fraudulent procuring and intermixture of the company's goods with his own. The goods thus procured and intermingled were of different kinds and values, and cannot be so distinguished as to enable those of one owner to be separated from those of the other. The rule applicable to the case is well settled by authority and in accordance with natural justice.

In Lupton v. White, 15 Ves. 432, Lord Eldon states the old law to be, that if one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but if articles of different value are mixed, producing a third value, the aggregate of both, and, through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole. The observations of Sir William Blackstone are cited in the note pointing out the distinction between the civil law and our own law upon this point; the civil law, though giving the aggregate to the party who did not interfere in the mixture, allowed the other a satisfaction for his losses. "But our law," says Blackstone, "to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his consent." In Hart v. Ten Eyck, 5 Johns. Ch. 108, it is ruled that, if a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produced it, and it is for him to distinguish his own property or lose it. If it be a case of damages, damages are given to the utmost value that the article will bear. The same doctrine is expressed and applied in Providence Rubber Co. v. Goodyear's Ex'r, 9 Wall. 988; The Idaho, 3 Otto 586; Wooley v. Campbell, 8 Vr. 169. In the last-cited case the language of Justice Depue is, that the doctrine that one mixing his goods with those of another, so that a separation is impossible, loses his property, is a doctrine that is adopted to prevent fraud. It is never resorted to except in favor of an innocent party as against a wrong-doer.

In the present case, it is claimed, and may prove to be true, that the whole indebtedness from Dringer to the company, including the $35,646.97 admitted to exist, is greater than the value of the goods in the receiver's possession. Whether this be so or not, the complainant is entitled to have the whole indebtedness ascertained as nearly as practicable, and a decree taken for the amount. For this purpose there should be a reference to a master. The receiver should be empowered to make sale of the goods and apply the proceeds to the debt admitted to be due, and the balance, if any, to the additional indebtedness that may, upon the accounting, be found to exist. The difficulties in the way of arriving at satisfactorily definite, or at any other than proximate and probable, results, as to the extent of the fraudulent weights, and still more as to the values of the materials fraudulently procured, are indeed great, and cannot, perhaps, be overcome; but they present no bar to the accounting and decree. "When," said Lord Brougham, in Docker v. Somes, 2 Myl. & K. 674, "did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrong-doer's argument, to stay the arm of justice, grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather let me ask, when did any wrong-doer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome? The answer is, the court will try."

In the light of the facts in this case, and of the legal and equitable principles expressed by the authorities cited, the injunction and receivership, directed by the chancellor in the early stages of this suit, are seen to have been the appropriate and efficient methods of relief. The consequences

to the defendant of the abrupt breaking up of his business and the taking possession of his goods by the court, destructive as they may have been of his seemingly great and rapid prosperity, are consequences of which he cannot be heard to complain. They were the legitimate end of his own dishonest practices, long-continued and systematic, by which the company and its receiver were defrauded of their property, their employees corrupted, involved in criminal guilt and made liable to criminal prosecution.

The decree below, dismissing the bill as to Dringer, should be reversed, with costs, and a decree made in accordance with the foregoing views.

DECREE UNANIMOUSLY REVERSED.

NOTE.—To work a forfeiture of the whole mass, where one has confused his own goods with those of other persons, two things are requisite, (1.) that the confusion be made fraudulently, and (2.) that after such confusion the articles be incapable of identification or apportionment.

I. No forfeiture is caused by an involuntary mixture or accession.

If A turn his sheep among B's, A's creditors can not levy on B's part of the whole flock. Kingsbury v. Pond, 3 N. H. 513; see Wildey v. Cox. 25 Mich. 116. Nor, by cattle being confounded and driven away with others on the highway. Young v. Vaugh, 1 Houst. 331; Brooks v. Olmstead, 17 Pa. St. 24; Brownell v. Flagler, 5 Hill 282; Van Valkenburgh v. Thayer, 57 Barb. 196; Wellington v. Wentworth, 8 Metc. (Mass.) 548; Brown v. Boyce, 68 Ill. 294. Where cattle trespassing mingled with those of the plaintiff, and communicated to them a dangerous disease: *Held*, admissible as affecting the damages. Anderson v. Buckton, 1 Str. 192; Barnum v. Van Dusen. 16 Conn. 200; see Jeffrey v. Bigelow, 13 Wend. 518; Cook v. Waring, 2 H. & C. 332: Mullett v. Mason, L. R. 1 C. P. 559. Pelts piled by a debtor on those of another, will not render the latter's pelts liable to the former's creditors. Gillman v. Hill, 36 N. H. 311; or, pork and lard so commingled; Huff. v. Earl, 3 Ind. 306; see Buckley v. Gross, 3 B. & S. 566; or, grain, Starr v. Winegar, 3 Hun, 491; Low v. Martin, 18 Ill. 286; Nowlen v. Colt, 6 Hill, 461; Seymour v. Wyckoff, 10 N. Y. 213; Lewis v. Whittemore, 5 N. H. 366; Wilson v. Nason, 4 Bosw. 155; Samson v. Rose, 65 N. Y. 411; Kauffmann v. Schillinger, 58 Mo. 218; Rahilly v. Wilson, 3 Dill. 420; Sims v. Glazener, 14 Ala. 695; Inglebright v. Hammond, 19 Ohio, 337; Morgan v. Gregg, 46 Barb. 183; Pierce v. O'Keefe, 11 Wis. 180; Adams v. Meyers, 1 Saw. 306; 6 Am. Law Rev. 450; Thompson v. Conover, 1 Vr. 329; 3 Vr. 466; South Australian Ins. Co. v. Randall L. R. 3 C. P. 101; Johnston v. Brown, 37 Iowa, 200; or, oil in tanks: Wilkenson v. Stewart, 85 Pa. St. 255; or, hay; Stock v. Stock, Poph. 38; Robinson v. Holt, 39 N. H. 563; or, earth taken from the plaintiff's land: Riley v. Boston Water Power Co., 11 Cush. 11; see Mather v. Trinity Church, 3 Serg. & R. 509; Muzzey v. Davis, 54 Me. 361; Connecticut R. R. v. Holton, 32 Vt. 43; Northam v. Bowden, 11 Exch. 70; Higgon v. Mortimer, 6 Car. & P. 616; or, if the confusion be caused by the action of a freshet: Moore v. Erie Railway Co., 7 Lans. 42; Sheldon v. Sherman, 42 Barb. 368; 42 N. Y. 484; see Gentry v. Madden, 3 Ark. 127; Washburn v. Gilman, 64 Me. 163; Rogers v. Judel, 5 Vt. 223; Foster v. Juniata Bridge Co., 16 Pa. St. 393; or, by a tempest: Spence v. Union Ins. Co., L. R. 3 C. P. 427; see Barker v. Bates, 13 Pick. 255; Whitwell v. Wells, 24 Pick. 25; Proctor v. Adams, 113 Mass. 376; Rogers v. Gilinger, 30 Pa. St. 185; Jones v. Moore, 4 Y. & C. 351, 356; but see, also, Buckout v. Swift, 27 Cal. 433; Waterman v. Dutton, 6 Wis. 265, 276; or, by the effect of a fire: Buckley v. Gross, 3 B. & S. 566; see Pope v. Garrard, 39 Ga. 471; Curry v. Schmidt, 54 Mo. 515; or, by any natural cause: State v. Burt, 64 N. C. 619; see Salisbury v. Herchenroder, 106 Mass. 458; Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rawle, 9; Broom's Max. 171.

In Hill v. Robison, 3 Jones (N. C.) 501, ten sacks of salt were bought and paid for by B with the funds of A, and at the same time B bought and paid for five sacks with his own funds: all the sacks were delivered to him unmarked, and, without separating any of them, B delivered all of them to C, his creditor, with instructions to deliver ten of them to A. C. converted them all to his own use.—*Held*, that A could not maintain trover against C, because he could show title to no specific property. In D'Eyncourt v. Gregory, L. R., 3 Eq. 382, certain tapestries bought by a testator, but hung, after his death, by the tenant in tail, were held not to have become annexed to the reality, but to belong to the executor. In Sharp v. United States, 12 Ct. of Cl. 638, large quantities of cotton belonging to different owners, had been captured by the federal army; part of it was destroyed, part used, and all marks to identify the remainder lost.—*Held*, that each owner was entitled to his proportion of the remainder.

An owner of trees does not lose his property by a trespasser converting them into timber: Pierrepont v. Barnard, 5 Barb. 364; Final v. Backus, 18 Mich. 218; or, into rails and posts: Snyder v. Vaux, 2 Rawle 423; Millar v. Humphries, 2 A. K. Marsh. 446; or, into railroad ties: Smith v. Gouder, 22 Ga. 353; Lake Shore R. R. v. Hutchins, Sup. Ct. Ohio, Dec. 1877, 6 Cent. L. J. 436; or, into staves: Heard v. James, 49 Miss. 236; or, into fire-wood: Halleck v. Mixer, 16 Cal. 574; Moody v. Whitney, 34 Me. 563; Brewer v. Fleming, 51 Pa. St. 102; or into shingles, Bettts v. Lee, 5 Johns. 348; Chandler v. Edson, 9 Johns. 362; Rice v. Hollenbeck, 19 Barb. 664; see Rockwell v. Saunders, 19 Barb. 473; Bennett v. Thompson, 13 Ired. 146; or, into a flat-boat, Burris v. Johnson, 1 J. J. Marsh. 196; but see Potter v. Mardre, 74 N. C. 36; or, saw-logs into boards: Brown v. Sax, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505; Davis v. Easley, 13 Ill. 192; see Pierce v. Schenck, 3 Hill 28; Gregory v. Stryker, 2 Denio 628; or, a raft of logs into fire-wood: Eastman v. Harris, 4 La. An. 193; or, wood into coal: Riddle v. Driver, 12 Ala. 590; Curtis v. Groat, 6 Johns. 169; or, corn into whisky: Silsbury v. McCoon, 3 N. Y. 379, 4 Denio, 332; or, hides into leather: Hyde v. Cookson, 21 Barb. 592; see Salmon v. Horwitz, 2 Am. Law Reg. 640; or, hides deposited in vats: Bond v. Ward, 7 Mass. 123; see Brakely v. Tuttle, 3 W. Va. 86; or, leather converted into saddles: Dunn v. Oneal, 1 Sneed, 106. In this case, however, there was a bailment; see Arnot v. K P. R. R., 19 Kan. 95. Oil taken from wells is not lost to the land owner by a trespasser merely carrying it away in his own barrels: Hail v. Reed, 15 B. Mon. 479.

A trespasser, by building a house on lands of another, loses the house: Ewell on Fixt. 57, et seq.: Waterm. on Tresp. § 681; also, Bonney v. Foss, 62 Me. 248; Mathes v. Dobschutz, 72 Ill. 438; Cannon v. Hare, 1 Tenn. Ch. 22; Poor v. Oakman, 104 Mass. 309; Beers v. St. John, 16 Conn. 322; Waterman v. Dutton, 6 Wis. 265; Rogers v. Woodbury, 15 Pick. 156; Holtzapple v. Phillebaum, 4 Wash. C. C. 356; see McKelway v. Armour, 2 Stock. 115; Wall v. Osborn, 12 Wend. 39; Leland v. Gassett, 17 Vt. 403; Taylor v. Townsend, 8 Mass. 411; Gray v. Oyler, 2 Bush 256; Smith v. Goodwin, 2 Me. 173; Fuller v. Tabor, 39 Me. 519; Russell v. Brown, 63 Me. 203; Humphries v. Newman, 51 Me. 40;

Finch v. Alston, 2 Stew. & P. 85: Whitaker v. Cawthorne, 3 Dev. 389; Reese v. Jared, 15 Ind. 142; Crum v. Hill, 40 Iowa, 506; Mills v. Redick, 1 Neb. 437; Emerson v. Western Union R. R. Co,, 75 Ill. 175; Carpentier v. Small, 35 Cal. 346; Ramsden v. Dyson, 12 Jur. (N. S.) 506; Jones v. Chappell, L. R. 20 Eq. 539; Linahan v. Barr, 41 Conn. 471; Bennet v.Clemence, 6 Allen, 10; Gibson v. Hutchins, 12 La. An. 545; also, Carson v. Clark and other cases *infra*. The secretary of a corporation bought books with his own money, in which he entered subscriptions to the stock, etc.—*Held*, that the property of the books was in the corporation: State, N. & N. Y. R. R. v. Goll, 3 Vr. 285. Two broken chains belonging, one to A and one to B, were carried by B, without A's consent, to a blacksmith, who made them into two chains, thereby adding two or three of A's links to B's chain.—*Held*, that the title did not thereby vest in A. Pulcifer v. Page, 32 Me. 404.

Furs left in a debtor's hands after an insolvent assignment, and made up by him into hats, were held to have lost their identity, so that the title was vested in the debtor: Worth v. Northam, 4 Ired. 102; see Swift v. Barnum, 23 Conn. 523; Gregory v. Stryker, 2 Denio, 628; Dresser Manf. Co. v. Waterston, 3 Metc. Mass. 9; rails and posts put on lands, as a fence, by a trespasser, belong to the land-owner: Ricketts v. Dorrel, 55 Ind. 470; see Hines v. Ament and other cases *infra*; and a railroad track: Van Keuren v. Central R. R., 9 Vr. 165; Hunt v. Bay State Iron Co., 97 Mass. 279; Shoemaker v. Simpson, 16 Kan. 43, 3 Cent. L. J. 616, 693; see Miss. & Tenn. R. R. v. Devaney, 42 Miss. 5s5; Ewell on Fixt. 58, note.

As to vacant lands, the general rule is, that the purchaser takes all improvements, etc., previously put thereon by a trespasser; as trees felled and cut into cord-wood: Brock v. Smith, 14 Ark, 431; Turley v. Tucker, 6 Mo. 583, overruling James v. Snelson, 3 Mo. 393. *Contra*, Keeton v. Audsley, 19 Mo. 362; Carpenter v. Lewis, 6 Ala. 682; Pennybecker v. McDougall, 48 Cal. 160; see, also, Perkins v. Hackleman, 26 Miss. 41; Hungerford v. Redford, 29 Wis. 345; Dreyer v.Ming, 23 Mo. 434; Waterm. on Tresp. §819; Winter v. Shrewsbury, 2 Scam. 283; Altemose v. Hufsmith, 45 Pa. St, 121. So, where the injury was done between the time of purchase and the actual entering into possession: Blevins v. Cole, 1 Ala. 210; Gale v. Davis, 7 Mo. 544. The rule extends to crops planted on vacant lands by a trespasser: Boyer v. Williams, 5 Mo. 335; Floyd v. Ricks, 14 Ark. 286; Rasor v. Qualls, 4 Blackf. 286; see Stockwell v. Phelps, 34 N. Y, 363; Reilly v. Ringland, 39 Iowa 106; Nudd v. Hobbs, 17 N. H. 524; or any improvements, such as fences, fruit trees, buildings, etc., made by a squatter: Carson v. Clark, 1 Scam. 115; Mitchell v. Billingsley, 17 Ala. 391; Hatfield v. Wallace, 7 Mo. 112; Campbell v. Com., 2 Rob. (Va.) 791; Cook v. Foster, 7 Ill. 652; Collins v, Bartlett, 44 Cal. 371; but shingles made thereon were held to belong to the maker: Reader v. Moody, 3 Jones (N. C.) 372; hay cut by one in adverse possession of public lands, cannot be replevied by a prior possessor: Page v. Fowler, 28 Cal. 605. 37 Cal. 100; see Johnson v. Barber, 5 Gilm. 425; Stockwell v. Phelps, 34 N. Y. 363; turpentine collected from trees by the lessee of a stranger in possession without title, was held not to belong to a subsequent purchaser from the State; Branch v. Morrison, 6 Jones (N. C.) 16; Branch v. Campbell, 7 Jones (N. C.) 378; see, also, Duncan v. Potts, 5 Stew. & Port. 82.

Stone tortiously taken from a quarry, dressed, and laid as a pavement, belongs to the owner of the lot: Jackson v. Walton, 28 Vt. 43; see Woodman v. Pease, 17 N. H. 282; materials removed from a house by a mortgagor, and sold and used by his purchaser in building a house on other lands, cannot be followed by the mortgagee: Peirce v. Goddard, 22 Pick. 559; Madigan v. McCarthy, 108 Mass. 376; also, Beers v. St. John, 16 Conn. 322; Salter v. Sample, 71 Ill. 430; see, however Hamlin v. Parsons, 12 Minn. 108; Wilmarth v. Bancroft, 10 Allen, 348; Dawson v. Powell, 3 Bush, 663; Beard v. Duralde, 23 La. An. 284; Strickland v. Parker, 54 Me. 263; Buckout v. Swift, 27 Cal. 433. A pole was taken by a trespasser, and used by him in erecting scaffolding; it was retaken by the owner, and in consequence of its removal, the scaffolding was weakened, fell and injured the trespasser when he went thereon. *Held*, that the owner was not liable: White v. Twichell, 25 Vt. 620. Pine trees cut by a mortgagor become personalty by the severance, and the mortgagee has no claim to them after foreclosure and sale: Berthold v. Holman, 12 Minn. 335; King v. Bangs, 120 Mass. 514; Gooding v. Shea, 103 Mass. 360; Peterson v. Clark, 15 Johns. 205; but see Gore v. Jenness, 19 Me. 53; Whidden v. Seelye, 40 Me. 247; see, also, Kircher v. Schalk, 10 Vr. 335; Rich v. Baker, 3 Denio, 79; Crouch v. Smith, 1 Md. Ch. 401; Hutchins v. King, 1 Wall. 53; Hewes v. Bickford, 49 Me. 71; Laflin v. Griffith, 35 Barb. 58; Bruce's Case, 16 Nat. B'k Reg. 318; Langdon v. Paul, 22 Vt. 205; Lackas v. Bahl, 43 Wis. 53; Curry v. Schmidt, 54 Mo. 515; O'Dougherty v. Felt, 65 Barb. 220; Moers v. Wait, 3 Wend. 104; Thomas v. Crofut, 14 N. Y. 474; Richardson v. York, 14 Me. 216; Waterm. on Tresp. §§ 772, 777, 840; the husband of a *cestui que trust* of lands, entering and cutting trees, with the trustee's consent, acquires no interest therein which can be subjected to his debts: Baldwin v. Porter, 17 Conn. 473; see Porch v. Fries, 3 C. E. Gr. 204; Mitchell v. Stetson, 2 Cush. 435; Glidden v. Taylor, 16 Ohio St. 509; Dickinson v. Codwise. 1 Sandf. Ch. 214.

A recovery in ejectment does not entitle the party to reclaim several millions of bricks made by the former occupant from the clay of the lands, under a supposed title: Lampton v. Preston, 1 J. J. Marsh. 454; see Harris v. Newman, 5 How. (Miss.) 654; Anderson v. Happler, 34 Ill. 436; Moseley v. Miller, 13 Bush, 408; O'Hagan v. Clinesmith, 24 Iowa, 249; Key v. Woolfolk, 6 Rob. (La.) 424; Miller v. Phillips, 31 Pa. St. 456; the same rule was applied to crops gathered before a *hab. fac. poss.* executed, or right of entry established: Brothers v. Hurdle, 10 Ired. 490; Thomas v. Moody, 11 Me. 139; Codrington v. Johnstone, 1 Beav. 520; see Hooser v. Hays, 10 B. Mon. 72; Pennybecker v. McDougall, 46 Cal. 661; Doe v. Witherick, 3 Bing. 11; Hodgson v. Gascoigne, 5 B. & A. 88; Simpkins v. Rogers. 15 Ill. 397; Altes v. Hinckler, 36 Ill. 255; Nichols v. Dewey, 4 Allen, 386; and to timber cut on lands of one not in possession: McClain v. Todd, 5 J. J. Marsh. 335; Cochran v. Whitesides, 34 Mo. 417; King v. Baker, 25 Pa. St. 186; see Rogers v. Potter, 3 Vr. 78; Yahoola Co. v. Irby, 40 Ga. 479; Shields v. Henderson, 1 Litt. 239; Ivey v. McQueen, 17 Ala. 408. An innocent purchaser from trespassers who cut trees and made them into railroad ties, is liable for their value as trees only, and not for their value, increased three-fold by the trespassers, as ties: Lake Shore R. R. v. Hutchins, Sup. Ct. Ohio, Dec. 1877, 6 Cent. L. J. 436; but see Nesbit v. St. Paul Lumber Co., 21 Minn. 491. An innocent purchaser of a steam-engine hired and wrongfully annexed to the freehold by the bailee, may hold it against the owner: Fryatt v. Sullivan Co., 5 Hill, 116, 7 Hill, 529; Goddard v. Bolster, 6 Me. 427; Frankland v. Moulton, 5 Wis. 1; Woodruff Iron Works v. Adams, 37 Conn. 233; see Cope v. Romeyne, 4 McLean, 384.

II. An intentional, but not fraudulent, mixture, it seems, works no forfeiture.

Pratt v. Bryant, 20 Vt. 333; Ryder v. Hathaway, 21 Pick. 298; Att'y Gen. v. Fullerton, 2 Ves. & B. 263; Clark v. Griffith, 24 N. Y. 595; see, however, Brakeley v. Tuttle, 3 W. Va. 86; Redington v. Chase, 44 N. H. 36: Goddard v. Bolster, 6 Me. 427; Clark v. Miller, 4 Wend. 628; Colburn v. Simms, 2 Hare, 543, 554.

In The Distilled Spirits, 11 Wall. 356, the govern-

ment, after forfeiture of certain spirits, ran them through leaches mingled with other spirits belonging to the same party. *Held*, that the identity of the liquor was not destroyed by the rectifying process, nor thereby forfeited by the government, and that each was entitled to his portion. In Gordon v. Jenney, 6 Mass. 465, after a deputy sheriff levied on certain goods in a store, another deputy levied on other similar goods, standing in front of the store, and carried them into the building where they were intermixed with the rest. *Held*, that the second deputy thereby lost his levy. Also, Sawyer v. Merrill, 6 Pick. 477; James v. Burnet, Spen. 635.

Bank-bills, securities, etc., not capable of identification, are forfeited by confusion with similar chattels; Panton v. Panton, 15 Ves. 440; Taylor v. Plumer, 3 M. & S. 562; Drake v. Taylor, 6 Blatch. 14; Ward v. Eyre, 2 Bulst. 323; Fellows v. Mitchell, 1 P. Wms. 81, 83; Levy v. Cavanagh, 2 Bosw. 100. See Tower v. Appleton Bank, 3 Allen, 387; Skidmore v. Taylor, 29 Cal. 619; Coffin v. Anderson, 4 Blackf. 395; Moody v. Keener, 7 Port. Ala. 218; Pettit v. Boujon, 1 Mo. 64; Sager v. Blain, 44 N. Y. 445.

Bricks laid in a wall, under a contract which was afterwards forfeited, the contract relet and the same bricks removed and piled up to be again used, became realty by their first use, and are not subject to levy, as personalty, by the creditors of the first contractor: Moore v. Cunningham, 23 Ill. 328; Beard v. Duralde, 23 La. An. 284; Wadleigh v. Janvier, 41 N. H. 505. Where milk was contributed by several farmers and worked into cheese by a company which sold it, each farmer sharing the expense and profit proportionately, the cheese was held not to be subject to levy by the creditors of one of the farmers: Butterfield v. Lathrop, 71 Pa. St. 225.

In Wetherbee v. Green, 22 Mich. 311, G, a tenant in common, authorized his co-tenant S, by parol, to sell timber from the lands. S being indebted to C and B, conveyed to them by warranty-deed, the undivided half of the land, on a parol condition to reconvey on payment of their debts. S, after such conveyance, sold a quantity of the timber to the plaintiff, who cut the same into hoops. On replevin brought by G, C and B for the hoops,—*Held*, that the timber cut under a supposed proper authority being worth $25 and the hoops made therefrom worth $700, the title passed to the plaintiff. Also, Baker v. Wheeler, Lock, Rev. Cas. 470; Alfred v. Bradeen, 1 Nev. 228; Elwell v. Burnside, 44 Barb. 447; Brown v. Sax, 7 Cow. 95; Haskins v. Record, 32 Vt. 575; Harmon v. Gartman, Harp. 430.

In Gray v. Parker, 38 Mo. 160, certain trunks belonging to the plaintiff disappeared and were found, as claimed, among other trunks, at defendant's trunk store.—*Held*, that no tortious taking being proved, it was error to instruct the jury that if the defendant willfully took and carried away the trunks, and afterwards mixed them with his own so that it was impossible to identify them, then the plaintiff was entitled to recover any of defendant's goods to the amount taken, although such instruction would have been correct, if the defendant had been shown to be a willful trespasser.

In Alley v. Adams, 44 Ala. 609, after the execution of a chattel mortgage on a steam-engine, etc., the mortgagor attached several other machines thereto. *Held*, that since they were capable of identification and detachment, the mortgagee could not claim them: see Randolph v. Gwynne, 3 Hal. Ch. 88; Perry v. Pettingill, 33 N. H. 433; Fowler v. Hoffman, 31 Mich. 215; Jewett v. Patridge, 12 Me. 243; Robinson v. Holt, 39 N. H. 557; Cochran v. Flint, 57 N. H. 514; Dunning v. Stearns, 9 Barb. 630; Adams v. Wiles, 107 Mass. 123. Hamilton v. Rogers, 8 Md. 301.

In Stuart v. Phelps, 39 Iowa, 14, the holder of a chattel mortgage on a crop of growing corn, brought trover against the defendant for its conversion. The latter claimed by virtue of a judgment and execution against the mortgagor. *Held*, that the plaintiff was entitled to recover the value of the corn in the crib, in which it had been put by the defendant, after husking, and that if the defendant had confused it with his own corn in the crib, the duty of separating his own lay on him; also that the cost of husking and gathering could not be deducted. See, also, Benjamin v. Benjamin, 15 Conn. 347; Ellis v. Wire, 33 Ind. 127; Backenstoss v. Stahler, 33 Pa. St. 251; Johnston v. Tantlinger, 31 Iowa, 500; Cook v. Steel, 42 Tex. 57; Lewis v. Whittemore, 5 N. H. 364; Herman on Chat. Mort., § 45.

The rule is the same, if a purchaser from the mortgagor with notice confound his own goods with those covered by the mortgage. Fuller v. Paige, 26 Ill. 358; Preston v. Leighton, 6 Md. 88; Willard v. Rice, 11 Metc. (Mass.) 493; see Southworth v. Isham, 3 Sandf. 448.

If a mortgagee, in possession, mixes his own goods with those mortgaged, a failure to select his own, at the mortgagor's request, is evidence of a conversion. Simpson v. Carleton, 1 Allen, 109; see Armstrong v. McAlpin, 18 Ohio St. 184.

In Rider v. Hathaway, 21 Pick. 298, it was held that, if a plaintiff mingled wood cut from different lots, supposing it all to be his own, and afterwards the defendant, knowing that a part of it came from the plaintiff's land, took the whole, he would be held liable as a trespasser. In Panton v. Panton, 15 Ves. 440, a clerk remitted his own money, together with that of his employer, to a broker, to be invested in securities, which became so confused that the property could not be distinguished. *Held*, that he must lose the whole. See Wharton on Agency, §§ 243, 279; Hall v. Page, 4 Ga. 428; Wiley v. Rixy, 43 Ga. 438; Beach v. Forsyth, 14 Barb. 499; Lord Chedworth v. Edwards, 8 Ves. 46, 50; Griffith v. Bogardus, 14 Cal. 410; Goddard v. Bolster, 6 Me. 427. So, if, after such confusion, the money be stolen, the burden of proof is on the agent to prove that the part stolen was his principal's. Bartlett v. Hamilton, 46 Me. 435.

The rule is the same as to confusion by an administrator or trustee. Perry on Trusts, §§ 128, 447, 463, 837; Lake v. Park, 4 Harr. 108; Frey v. Demarest, 1 C. E. Gr. 236; Elmer v. Loper, 10 C. E. Gr., 475; Brackenridge v. Holland, 2 Blackf. 377; Ringgold v. Ringgold, 1 Har. & Gill. 11; Crane v. De Camp, 7 C. E. Gr. 614; and as to creditors the *cestui que trust* thereafter stands the same as any other creditor. Nevins v. Disborough, 1 Gr. 343: Janeway's Case, 4 Nat. Bank. Reg. 100; Thompson's Appeal, 22 Pa. St. 16.

III. A confusion of goods by mistake creates no forfeiture.

In Weymouth v. C. & N. R. R. Co., 17 Wis. 556, wood was cut by the plaintiff and piled near the track of the defendants, for sale. By mistake, they took the wood away, and piled it, indiscriminately, with other wood of their own.—*Held*, that the proper measure of damages was its value at the time of the conversion, with such increase as it may have received from any cause independent of the defendant's acts. Also, Moody v. Whitney, 38 Me. 174; Forsyth v. Wells, 41 Pa. St. 291; Grant v. Smith, 26 Mich. 201; Farwell v. Price, 30 Mo. 587; but see Bennet v. Thompson, 13 Ired. 146; Smith v. Gouder, 22 Ga. 353; Benjamin v. Benjamin, 15 Conn. 347; Hill v. Canfield, 56 Pa. St. 454; Coxe v. England, 65 Pa. St. 212; Bailey v. Shaw, 24 N. H. 297; Hungerford v. Redford, 29 Wis. 345; Pearson v. Inlow, 20 Mo. 322.

In Winchester v. Craig, 33 Mich. 205, defendants, who by mistake trespassed and cut logs on lands of the plaintiff and transported them with their own to

market, were allowed the expense incurred by them in getting the logs from the land to the market. Also, Foote v. Merrill, 54 N. H. 490; Final v. Backus, 18 Mich. 218; see Chipman v. Hibbard, 6 Cal. 162; Whitbeck v. N. Y. Cent. R. R., 36 Barb. 644; Kier v. Peterson, 46 Pa. St. 357; Young v. Lloyd, 65 Pa. St. 197; Webster v. Moe, 35 Wis. 75; Isle Royal Mining Co. v. Hertin, Supt. Ct. Mich., Oct. 1877, 17 Alb. L. J. 114; Nesbet v. St. Paul Lumber Co., 21 Minn. 491. In Newson v. Anderson, 2 Ired. 42, A cut a tree on his own land, which accidentally fell on B's land.—*Held*, that A was liable therefor in trespass. See, also, Lambert v. Bessy, Ray. T. 421; Wilson v. Newbury, L. R. 7 Q. B. 31; Scullin v. Dolan, 4 Daly 163; Wright v. Compton, 53 Ind. 337. In Leonard v. Belknap, 47 Vt. 602, ten turkeys belonging to the plaintiff wandered on defendant's land, and there mingled with and were shut up with his turkeys. In trover, after a demand: *Held*, that since plaintiff, as shown by the evidence, was entitled to ten of them, although he could not identify all of his own, that defendant's offer to allow him to take all that he could identify and any others that he might select up to a certain number—which, however, was less than ten—constituted a conversion.

In Smith v. Morrill, 56 Me. 566, the plaintiff trespassed on defendant's lands, cut their logs, put his own mark on them, and rafted them all together. The defendants, thereupon, with an intention of only reclaiming their own, actually took more. In trover, for the value of the excess,—*Held*, that they were not liable, as wrong-doers, until the plaintiff had pointed out his property and demanded it. Also, Bryant v. Ware, 30 Me. 295; Barron v. Cobleigh, 11 N. H. 559; May v. Bliss, 22 Vt. 477; Root v. Bonnema, 22 Wis. 539. In Parker v. Walrod, 13 Wend. 296, 16 Wend. 514, a plaintiff, while a wagon of the defendant was in his possession, attached his own whiffletrees, etc., thereto, and they were retaken by the defendant, without knowledge of the change.—*Held*, that trespass would not lie to recover the appendages. *Query*, whether there was any remedy. See Clark v. Wells, 45 Vt. 4.

In Hines v. Ament, 43 Mo. 298, a fence placed on another's lands, by reason of mistake of bounderies, was held not to lose its character as personalty. Also, Matson v. Calhoun, 44 Mo. 368; Whitfield v. Bodenhamer, Phillips (N. C.) 362; Stuyvesant v. Tompkins, 9 Johns. 61, 11 Johns. 569; Wentz v. Fincher, 12 Ired. 297; Doherty v. Thayer, 31 Cal. 140: Waterm. on Tresp. § 715; Ogden v. Lucas, 48 Ill. 492; Robertson v. Phillips, 3 Iowa, 220; compare Burleson v. Teeple, 2 Greene (Ia.) 542; Pfeifer v. Grossman, 15 Ill. 53; Howard v. Black, 42 Vt. 258; Brown v. Bridges, 31 Iowa, 138; Gidden v. Bennett, 43 N. H. 306; State v. Graves, 74 N. C. 396; McLaughlin v. Johnson, 46 Ill. 163; Huntington v. Whaley, 29 Conn. 391; Millar v. Humphries, 2 A. K. Marsh. 446.

In Treat v. Barber, 7 Conn. 274, the plaintiff had in her possession, in a trunk, certain articles of clothing, etc., of her own, which trunk also contained other similar articles claimed by her and also claimed as her father's. On the service of an attachment by his creditors, she refused to select from the trunk her own property, or to point out which belonged to her father. *Held*, that there was no confusion of goods, since no actual fraud was shown, that the placing of the goods in the same trunk might have been accidental, and that the defendants were liable in trespass.

IV. As to a fraudulent mixture, the intent is always a question for the jury.

Taylor v. Jones, 42 N. H. 25; Wood v. Hewett, 10 Jur. 390. See Watkins v. Gale, 13 Ill. 152.

In Wingate v. Smith, 20 Me. 287, mill logs were fraudulently taken by another, converted into boards and so intermixed with his own as not to be distinguished. *Held*, that replevin would lie for the whole pile of the boards. In Ames v. Mississippi Boom Co., 8 Minn, 467, it was held that a plaintiff in replevin must identify logs claimed by him, notwithstanding the fact that defendant may have driven them with his own, so as to render them indistinguishable. Also, Wood v. Fales, 24 Pa. St. 246. In Loomis v. Green, 7 Greenl. 386, it was held that if one willfully turns his own logs adrift in a stream, and they, in floating down, become confounded with others, the burden of proof is on him to identify his own. See, also, Hesseltine v. Stockwell, 30 Me. 237. In Heard v. James, 49 Miss. 236, the defendants willfully cut trees on the plaintiff's lands, and converted them into staves. *Held*, in replevin, that they were not entitled to deduct the value of their labor from the value of the staves. See, also, Smith v. Gouder. 22 Ga. 353; Buckmaster v. Mower, 21 Vt. 204; Single v. Schneider, 30 Wis. 570; Herdic v. Young, 55 Pa. St. 176; Firmin v. Firmin, 9 Hun. 571; Nesbit v. St. Paul Lumber Co., 21 Minn. 491.

As to a fraudulent mixture of literary matter, see Mawman v. Tegg, 2 Russ. 385. 391; Lewis v. Fullarton, 2 Beav. 11; 2 Morgan's Law of Lit. 616.

In McDowell v. Rissell, 37 Pa. St. 164, a brother-in-law of a judgment-debtor fraudulently mingled his own goods, old iron, scrap, etc., with that upon which creditors of the other owner were entitled to levy, and manufactured the whole. *Held*, that he must lose the whole. See Redington v. Chase, 44 N. H. 36. In Beach v. Schmultz, 20 Ill. 185, a cargo of different kinds of lumber was shipped to M.; there, without the knowledge of the plaintiff, a quantity of the same kind of lumber was put on board by G, and the whole reshipped to C. *Held*, that the creditors of G could not attach his interest in the cargo, because it could not be identified, and that G forfeited the quantity he had added. Also, Jenkins v. Steanka, 19 Wis. 139.

In Seavy v. Dearborn, 19 N. H. 351, a plaintiff was held to have lost all right to reclaim goods which he had willfully intermixed with those of a third person in a store. Also, Smith v. Welch, 10 Wis. 91; Willard v. Rice, 11 Metc. 493.

V. In the following cases the rule has been adopted that even where the confusion has been fraudulent, the goods, if still capable of identification or apportionment, may be reclaimed.

In Hesseltine v. Stockwell, 30 Me. 237, a trespasser cut the plaintiff's logs, marked them with his own mark, and drove them with his own logs. *Held*, that even if such acts were fraudulent, there could be no forfeiture, because the logs being of equal value, each owner was entitled to his proportion of the whole. Also, Stearns v. Raymond, 26 Wis. 74. In Goodenow v. Snyder, 3 Greene (Ia.) 599, the same rule was applied in case of a forcible taking of gold dust by the defendant, and mixing it with his own. In Schulenberg v. Harriman, 2 Dill. 398, 21 Wall. 44, logs were cut without license from lands belonging to the State of Minnesota, and intermingled with logs cut from other lands, so as not to be distinguishable. *Held*, under the Minnesota statute, that the State could replevy her proportion from the whole mass. In Stephenson v. Little, 10 Mich. 433, the court were divided as to this point. See, also, Ballou v. O'Brien, 20 Mich. 304. In Wood v. Fales, 24 Pa. St. 246, after the plaintiffs sent a large number of cloths to be printed, the sheriff seized all of the goods in the factory, and the plaintiffs then claimed two hundred and fifty-two pieces, and, not being able to identify their own, they claimed that number of similar goods. *Held*, that if the printers had actually confused them, the plaintiffs' claim must be allowed; *aliter*, if they had sold the goods, and had on hand similar goods which they intended to put in their place. In Wooley v. Campbell, 8 Vr. 163, a trespasser planted oysters in plaintiff's bed. *Held*, that he could not set

up that the oysters taken by the plaintiffs were not natural ones, or those planted by them. In Powers v. Kindt, 13 Kas. 74, cattle belonging to two owners trespassed on lands, and it was impossible to determine the exact damage done by the cattle of each owner. *Held*, that a verdict apportioning the damage according to the number of cattle belonging to each owner, was good. See Durham v. Goodwin, 54 Ill. 469.

An officer is not justified in levying on several articles where only some of them belong to the defendant, if those not belonging to him are capable of identification, as furniture in a house. Bond v. Ward, 7 Mass. 123; Smith v. Sanborn, 6 Gray, 134; Colwill v. Reeves 2 Camp. 575. But see Taylor v. Jones, 42 N. H. 25; Armstrong v. McAlpine, 18 Ohio St. 184; or, cattle, Holbrook v. Hyde, 1 Vt. 236: or, boots and shoes in boxes, marked: Tufts v. McClintock, 28 Me. 424; or, crockery standing on a shelf, Treat v. Barber, 7 Conn. 274; or, horses in separate stalls, Moore v. Bowman, 47 N. H. 494.

In Albee v. Webster, 16 N. H. 362, a sheriff finding goods of A., the execution debtor, mingled with those of B., called upon B. to separate his therefrom, and on refusal levied on the whole. *Held*, that he was not a trespasser. Also, Sawyer v. Merrill, 6 Pick. 477; Shumway v. Rutter, 8 Pick. 443; Weil v. Silverstone, 6 Bush, 698; Wellington v. Sedgwick, 12 Cal. 469; Smith v, Sanborn, 6 Gray, 134; Robinson v. Holt, 39 N. H. 557; Roth v. Wells, 41 Barb. 194, 29 N. Y. 471. But see Kingsbury v. Pond, 3 N. H. 511, where the confusion was without the fault of the plaintiff, and the sheriff was held liable as a trespasser; and also Wilson v. Lane, 33 N. H. 466; Treat v. Barber, 7 Conn. 274.

JOHN H. STEWART.

WILL—EVIDENCE—DECLARATIONS OF DECEASED.

MERCER'S ADMRS. v. MACKIN.

Court of Appeals of Kentucky, September Term. 1878.

Hon. W. S. PRYOR, Chief Justice.
" M. H. COFER, } Judges.
" J. M. ELLIOTT, }
" T. H. HINES, }

A will can not be established by evidence of the declarations of the deceased that he had made a will.

COFER, J., delivered the opinion of the court:

Felix Mercer died in May, 1876, domiciled in Marion county. He was never married, but was a father of four natural children, whom he recognized as his, three of whom, with their mother, resided with him on his farm near Lebanon. His eldest child, by another mother, was married in 1858, contrary to his wishes, and an estrangement existed between them for some years, but he had become reconciled to her long before his death. Claiming that he had left a holograph will, but being unable to produce it, his married daughter, Mrs. Mackin, and the mother of the three younger children, for herself and for them, presented to the county court a writing purporting to be the substance of the last will and testament of Mercer, and moved to have it probated. No evidence was offered, and the writing was rejected; and the propounders appealed to the circuit court, where the supposed will was established, and from that judgment Mercer's heirs-at-law prosecute this appeal.

The evidence relied upon to establish the will is, in substance, as follows: That Mercer was warmly attached to his children, and unfriendly to many, if not all, of his collateral kindred; that he often declared that they should not have any part of his estate; that he intended it for his children; that he knew if he died without a will they would not get any part of it; that he was a man of more than ordinary mind, and was capable of writing a will; that before the three younger children were born he made a will, by which he made liberal provision for Mrs. Mackin, then a child; that after one ore more of the three younger children were born he said circumstances had changed, and he had made another will; that he said he did not intend to live a day without a will, that he always kept a will by him, that his children were provided for, and would be educated, whether he lived until it was done or not.

Some of these declarations were proved to have been repeated, and two witnesses, Mackin and the mother of the younger children, swore that he told them he had made a will, and had written it himself; and the latter swore that on the day of Mercer's death one of his nephews, an heir-at-law, was at his house, and in the room with him, where he kept his papers, and saw him at the desk where they were kept, and that he put something under his coat, and afterward, at the dinner table, she saw him acting as if concealing something under his coat. She also swore that one of Mercer's pocket-books was missing, but in that, as well as in other things, she was contradicted by evidence of inconsistent declarations out of court, as well as by the positive denial of the nephew, whom she implicated.

There was other evidence calculated in some degree to strengthen and confirm that we have stated, but as we do not find it necessary to pass upon any question of fact proper for the consideration of a jury, and what we have stated is sufficient to present the questions of law involved, we need not extend this opinion by any more detailed statement of the evidence.

The will, as probated, gives to Mrs. Mackin for her life the sum of $10,000, remainder to her children: to two of the three younger children a farm, and the other the residue of the estate, and provides that their mother shall have a right to live on the farm and occupy it as a home to raise and take care of the children.

The first question presented is, whether these two devisees were competent witnesses for the propounders?

The provisions of the Code relating to the competency of witnesses do not "affect the competency of attesting witnesses of instruments which are by law required to be attested." Sub-sec. 11, sec. 606, Bullitt's Code.

This being a holograph will, the law does not require it to be attested; but the supposed will not having been produced, it is agreed with great plausibility that these witnesses, proving as they do the declarations of the testator that he had

made a will—had written it himself—thereby dispensing with the formal attestations of witnesses on the will itself, stand, as respects their competency, in the attitude of attesting witnesses, and occupy the same position as if they had attested the execution of a will not written by the testator, by subscribing their names thereon as witnesses.

But if this were conceded, we think it would not affect our decision. Section 13, chap. 113, G. S., contains this language: "And if a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be a competent witness; but such devise or bequest shall be void; except that if such witness would be entitled to any share of the estate of the testator in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed." Under this provision, even an heir-at-law is a competent witness to prove the execution of a will if it may not be otherwise proved. Whether any, and what, foundation ought ordinarily to be laid to show that the will cannot be otherwise proved, we need not decide, as we think the circumstances of this case are quite sufficient to show that no other evidence of the execution of the will was known to the propounders. Perhaps, under ordinary circumstances, the propounders ought to make and file an affidavit that the execution of the will cannot be otherwise proved unless that fact appears from the will itself.

Under the statute, *supra*, a devisee who is an attesting witness, and as such proves the execution of the will, thereby renders the devise to himself void; but if he be an heir-at-law, he will take his share as such, not to exceed the value of the devise to him. These devisees were therefore competent witnesses to prove the execution of the will.

But whether their *testimony* was competent is a wholly different question. They did not testify that Felix Mercer made a holograph will. They only testified that he said he had made such a will; and it was only by evidence given by these same witnesses of his oral declarations that the contents of the supposed will were ascertained.

The statute provides that no will shall be valid unless in writing, with the name of the testator subscribed thereto by himself, or by some other person in his presence, and by his direction; and, moreover, if not wholly written by the testator, the subscription shall be made, or the will acknowledged by him, in the presence of at least two credible witnesses, who shall subscribe the will with their names, in the presence of the testator.

The primary evidence of the existence of a last will, and of its contents, is the will itself, and the primary evidence that it is a holograph will is the testimony of persons acquainted with the handwriting of the testator, who, upon inspecting it, testify that he wrote it. Evidence of the declarations of the tesator that he had written a will and as to its contents, is, if competent, only secondary, and according to a well settled rule of the law of evidence, is not admissible until satisfactory evidence of the loss or destruction of the will be given. No such evidence was offered in this case. The devisees, who were sworn as witnesses, and one of whom resided in the house with the testator for years before and at the time of his death, did not, even on the witness stand, avow their ignorance of the whereabouts of the will or prove that it was lost.

Moreover, assuming that such a will had once existed, the law, from the fact that it could not be produced, if standing alone, presumes its revocation, unless its loss was accounted for, which was not even attempted, except by the statement of the witness that she saw a nephew of Mercer at the desk where he kept his papers, and that she saw the nephew concealing something under his coat, and her statement about a missing pocket-book, and the statement of another witness that, shortly before his death, Mercer had a pocket-book that seems not to have been seen among his effects after his death. Mercer was in the room when the witness says she saw the nephew hide something under his coat, and was in condition to have observed the taking of anything from the desk, went out with him to dinner immediately after; and there was a total absence of proof that the will was ever in that desk except the fact that papers were kept in it. Besides, the evidence showed that the nephew could not read, and he swore that he did not take anything from the desk.

But waiving this question, the evidence of the declarations of Mercer were inadmissible upon other and more substantial grounds.

He declared he had made a will—had written it himself. This could in no event be sufficient. In order that it might be a valid will he must not only have written it, but must have subscribed his name to it at its conclusion. Section 5, chapter 113, and section 26, chapter 21, General Statutes.

There is no evidence that he said he had subscribed it with his name, or that he knew such subscription was necessary to its validity. What he said was, therefore, but an expression of his opinion as to what was necessary to constitute a valid will, in which he may have been wholly mistaken. But had he declared that he wrote and signed it with his own hand, evidence of such declaration would not be sufficient to authorize the probating of the will.

Counsel for the appellee contend with much earnestness that evidence of these declarations is admissible against the heirs-at-law of Mercer, because of the privity between him and them.

If Mercer had declared that he had sold his land, or that he held it as tenant, or had but a life-estate in it, or that he owed a debt to A, his declarations would have been competent evidence, in a proper case, against his representatives.

But such declarations would not constitute the foundation of any right in the claimant. They would be evidence, and only evidence, of a right pre-existing, and wholly independent of the declarations.

They would be directly against his own inter-

est, and, being against his interest, it is so extremely improbable that he would have made them, if untrue, that they would be admissible against him or his representatives.

"The regard which men generally pay to their own interests is deemed a sufficient security, both that the declarations were not made under a mistake of fact, or want of information on the part of the declarant, if he had the requisite means of knowledge, and that the matter declared is true." 1 Greenleaf 's Evidence, section 148.

But it is essential that such declarations, *when made*, should have been *self-disserving; i. e.*, that they should have been, *when made*, against the pecuniary or proprietary interests of the declarant. Sections 228, 237, 1,168, Wharton on Evidence.

Declarations by Mercer that he had made a will were not, in any sense, against his interests, and consequently they do not fall within the reason of the rule, under which this class of hearsay is admitted in evidence. That regard which men generally have for their own interests is the principal foundation upon which the rule admitting declarations against interest is based. Experience has taught us that when one makes a declaration in disparagement of his own rights or interests, it is generally true, and because it is so, the law has deemed it safe to admit evidence of such declarations against him, and those claiming through or under him. But the rule is limited to declarations prejudicial to his pecuniary or proprietary interests. Wharton on Evidence, section 228.

Declarations that the declarant has made a will not only want that guaranty for their truth on which the rule admitting evidence of declarations is based, but of all kinds of declarations relating to important subjects, none are more unreliable than declarations concerning wills.

(*Concluded next week.*)

NOTES OF RECENT DECISIONS.

BANK LIABLE FOR DEFAULT OF CORRESPONDENT EMPLOYED TO COLLECT PROMISSORY NOTE.—*Indig v. National City Bank.* New York Supreme Court, First Department, 19 Alb. L. J. 31. Opinion by GILBERT, J. A bank in Brooklyn received from plaintiff for collection a note payable at a bank in Lowville. This note was sent by mail to the bank in Lowville and was collected by that bank, which remitted its own draft for the proceeds to the Brooklyn bank. On the same day the Lowville bank failed and the draft was dishonored. *Held*, that the Brooklyn bank was liable to plaintiff for the amount of the note. Cases cited: Allen v. Merchants Bk., 22 Wend. 215; Montgomery Co. Bk. v. Albany City Bk., 1 Kern. 203; Ayrault v. Pacific Bk., 47 N. Y. 570; Bank of Utica v. McKinster, 11 Wend. 473.

PRINCIPAL AND SURETY — BANK MESSENGER'S BOND—NEGLIGENCE. — *German American Bank v. Auth.* Supreme Court of Pennsylvania, 6 W. N. 259. Opinion by Gordon, J. The plaintiff bank employed A, one of the defendants, as its messenger. and took from him a bond in the sum of ten thousand dollars, with B and W, the other two defendants, as sureties, conditioned that the said A should account for and pay over any and all moneys that might come into, or pass through, his hands as messenger, and should in all things conduct himself honestly and faithfully as such messenger. The bank officers entrusted to A, the combination of the safe, and gave him access thereto. On the 28th of May, 1875, there was taken from the vault of the bank $3066.75, and at the same time A disappeared. In an action by the assignee of the bank against B and W, sureties on the bond of A: *Held*, that B and W were liable, because any dishonest act of A while acting as messenger, which caused a loss to the bank, was a breach of the condition of the bond, whether done while acting within the scope of his employment as messenger or not. *Held*, further, that it was not negligence in the officers of the bank, contributory to the loss, to entrust the messenger with the combination of the safe.

LANDLORD AND TENANT— DISTRESS FOR RENT — GOODS HELD FOR SALE ON COMMISSION NOT LIABLE.—*Howe Machine Co. v. Sloan.* Supreme Court of Pennsylvania, 6 W. N. 265. 1. Goods entrusted to an agent to be sold on commission are not liable to distress for rent due by the agent. 2. The H. M. Co. having consigned some sewing machines to M to be sold by him on commission, S distrained them for rent due by M. In an action of replevin: *Held* (reversing the judgment of the court below), that the machines were not liable to such distress. Karns v. McKinney, 23 Sm. 387, approved. SHARSWOOD, C. J. "The rule of the common law that the goods of a stranger on demised premises are subject to the distress of the landlord has yielded and must continue to give way to the growing necessities of trade and business. As Chief Justice Gibson has said: 'There is little reason to doubt that the exceptions will, in the end, eat out the rule.' It is not a subject upon which it would be wise to draw refined distinctions. It was settled in Brown v. Sims, 17 S. R. 138, that goods on storage were exempt, though the business of the tenant was not exclusively that of a warehouseman. Certainly a man may safely entrust his cattle to a farmer to agist, who raises his own beasts for the drove or the market. Nor is there any reason why a similar principle should not be applied to the case of goods entrusted to an agent to be sold on commission. It is notoriously the usage for merchants, not holding themselves out as commission merchants, to receive and sell goods in that way. In the particular case before us it would seem reasonable to infer that the products of sewing machine companies, the machines themselves, being known by the name of the manufactures, are usually sold by their agents on commission. There was enough to put the landlord on inquiry, if notice was necessary. The broad principle which governs the case has been succintly and happily expressed by Mercur, J., in Karns v. McKinney, 24 P. F. Sm. 390: 'The principle,' he says, 'covering these cases during the tenancy, except when the goods are in the custody of the law, is this: where the tenant, in the course of his business, is necessarily put in possession of the property of those with whom he deals, or of those who employ him, such property, although on the demised premises, is not liable to distress for rent due thereon from the tenant.' "

UNAUTHORIZED ISSUE OF COUNTY BONDS BY COUNTY TREASURER NOT FORGERY IN THIRD DEGREE.—*People v. Mann.* Court of Appeals of New York, 19 Alb. L. J. 28. The provisions of 2 R. S. 673, § 33, making forgery in the third degree to be the falsely making or altering, with intent to defraud, any instrument in writing, "being or purporting to be the act of another," whereby any pecuniary demand shall be or purport to be contracted, does not embrace a

case where a county treasurer, without authority, makes an instrument purporting in its body to be an obligation of the county, and signs his own name to it as the official representative of the county. The instrument forged must purport to be the act of another. RAPALLO, J.: "We can not adopt the interpretation of this statute claimed by the counsel for the people. He contends that one who without authority makes an instrument purporting in its body to be the contract or obligation of a county, though he signs his own name to it as the official representative of the county, comes within the purview of the act; that the words 'purporting to be the act of another,' are synonymous with 'purporting to be the contract or obligation of another.' We think that the 'act' referred to in the statute is the making of the instrument, and that the offense consists in falsely making an instrument purporting to be made by another. The offense intended to be defined by the statute is forgery and not a false assumption of authority. One who makes an instrument, signed with his own name, purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it, although by legal intendment it would, if authorized, be deemed the act of the principal, and be as binding upon him as if he had actually made it. The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper. Suppositious cases have been ingeniously suggested for the purpose of showing that unless the construction claimed is adopted, forgeries of corporate names and of the names of joint-stock companies might not be reached by the statute It will be time to deal with those cases when they arise. It is sufficient for the purposes of the present case that the instrument which the defendant is charged with having forged, purports on its face to have been made by himself and not by any any other person."

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

November Term, 1878.

HON HORACE GRAY, Chief Justice.
" JAMES D. COLT, }
" SETH AMES, }
" MARCUS MORTON, }
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

TAX COLLECTOR— ILLEGAL ASSESSMENT — CONVERSION.—1. A tax collector is protected by his warrant in the taking and selling of property, notwithstanding the illegality of the assessment. He is entitled to the benefit which the law affords to ministerial officers in the service of process, issued by courts of competent jurisdiction, and is not bound to examine into the legality of previous proceedings. Hubbard v. Garfield, 102 Mass. 32; Underwood v. Robinson, 106 Mass. 296; Rawson v. Spencer, 113 Mass. 40. 2. The sale in such case can not be avoided in whole or in part, but the plaintiff is left to his remedy against the school district, etc., for the illegal excess. 3. In the case at bar, nine cows were destrained and sold separately for the prices specified in the defendant's return; and it appeared that the sale of the first seven produced a sum sufficient to pay the full amount of the tax, cost of distraint, and the defendant's fees, and that this was known to the defendant at the time. *Held*, that it was defendant's duty thereupon to return, or offer to return, the remaining cows, and that his act in proceeding to sell the same was a wrongful conversion of the property for which he is liable in this action, but which does not render him a trespasser *ab initio*. Seekins v. Goodale, 61 Me. 400. Opinion by COLT, J. —*Cone v. Forest.*

CONTRACT—GUARANTY—INSTRUCTION.—The plaintiff agreed to take charge of defendant's brick yard, for the purpose of superintending improvements to be made, and of making bricks. He contracted "to have the bricks made and burned in the best manner, and at the lowest cost possible," and to "attend to and watch over the interests of the work, manufacture and property, the same as would a careful, skillful, prudent owner for himself. In a suit on the contract for compensation, it was *held*, that there was no guaranty on the part of the plaintiff that the bricks should be made by him in the best possible manner and at the lowest cost possible, although the difficulty in making them might be wholly due to the character of the clay or other materials used, or the imperfection in the tools and machinery furnished by the plaintiff; and an instruction to the jury founded on such an interpretation of the contract was rightly refused. Opinion by COLT, J.—*Talbot v. Heath.*

HEIR AT LAW — OMISSION TO PROVIDE FOR IN A WILL—EVIDENCE.—In a writ of entry it appeared that the mother of the defendant died leaving a will, executed about a month before the birth of the defendant and three months before her death, by which she gave all the real and personal property of which she might die possessed, to her husband. The defendant was her sole heir, and there was an entire omission to provide for him in the will. *Held*, that the right of the defendant to recover, by virtue of Gen. Stats., ch. 92, § 25, as he would be entitled to if she had died intestate, depends upon whether the omission was intentional and not occasioned by accident or mistake. The justice, before whom the case was tried without a jury, was justified in finding such to be the fact. The omission may be shown to be intentional, either by the terms of the will or by extrensic parol evidence. Wilson v. Forket, 6 Met. 400. There is nothing in this will, except the fact of omission, which indicates a purpose not to provide for her son; but the relation of the testatrix to the objects of her bounty and to her child for whom provision is omitted, as well as her intelligence, and the circumstances under which the will is made, are all proper matters of consideration. Buckley v. Gerard 123 Mass. 8. The judge might well find that the fact that the testatrix was so soon to be delivered of the first child, must have been in her mind when her will was made, and that it could not have been forgotten. See Ramsdell v. Wentworth, 101 Mass, 125. Opinion by COLT, J.—*Peters v. Siders.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF IOWA.

October Term (*Dubuque*), 1878.

Hon. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, }
" JAMES G. DAY, }
" JOSEPH M. BECK, } Associate Justices.
" AUSTIN ADAMS, }

TAXATION—OMISSION TO MAKE LEVY — MAY BE MADE IN SUCCEEDING YEAR. — Where a board of supervisors failed to levy a tax which had been properly certified to them as having been voted by a school district: *Held*, that they had power to make the levy

with that of the succeeding year without further certification, and that persons purchasing property in the school district after the tax would have been payable if levied at the proper time were not entitled to an injunction restraining its collection, it not appearing that they purchased in ignorance of the facts. Opinion by SEEVERS, J.—*Perrin v. Benson.*

JURISDICTION—DEFECTIVE SERVICE OF NOTICE—JUDGMENT.—1. The fact that the return of service on an original notice fails to show the date of such service will not render the judgment based thereon absolutely void and subject to collateral attack, but can only be taken advantage of by direct proceedings. 2. A motion to set aside a judgment made four years after the judgment is rendered, is in the nature of a collateral proceeding, and can not be considered as a direct attack upon the judgment. Opinion by DAY, J.—*Wilson v. Call.*

PLEADING— PETITION FOR NEW TRIAL— NEWLY DISCOVERED EVIDENCE.—A petition for new trial on the ground of newly discovered evidence, under secs. 3154 and 3155 of the Code, is sufficient if it follows the language of the statute, and alleges that the petitioner could not with reasonable diligence have discovered the evidence before the trial; the acts done by the petitioner to procure evidence, or other facts relied upon to show diligence, need not be set out as is required in affidavits in support of a motion for a new trial, which are in the nature of evidence. Opinion by DAY, J.—*Woodman v. Dutton.*

COAL MINES — RESERVATON OF COAL IN DEED—NEGLIGENCE IN MINING.—Action to recover damages for injury to the premises of plaintiff caused by the alleged negligence of defendant in mining coal thereunder. The land was conveyed to the plaintiff by the defendant, the latter reserving in the deed "all coal" beneath the surface of the soil and the right to mine and remove the same, "without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land:" *Held*, that defendant was liable for injury caused by negligence in mining and removing such coal, and that while by the terms of the reservation he was entitled to all the coal, yet if ordinary care and prudence required the leaving of pillars of coal for the proper support of the mine and protection of the surface, he was liable for injury caused by a failure to leave such pillars. Opinion by BECK, J —*Livingston v. Moingona Coal Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1878.

[Filed December 24, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. MCILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

EXTRADITION — PRACTICE. — 1. The certificate of authentication provided for in § 5278 of the United States Revised Statutes, 1027, is not required to be in any particular form, and where the language employed by the demanding governor in the requisition shows the copy of an indictment annexed thereto to be authentic, it is sufficient. 2. It is no ground for discharging a fugitive from justice on *habeas corpus* that the indictment, after charging embezzlement by way of conclusion, in the same count, also avers that "so" the defendant committed larceny. 3. Where from the authenticated copy of the indictment annexed to the requisition it appears that the fugitive stands charged in the demanding State with embezzlement, the printed statutes of such State, purporting to be published by its authority, may be received to show that embezzlement is made a crime by the laws of that State. 4. After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding State to avoid prosecution. Application denied. Opinion by GILMORE, J. *Ex parte Sheldon.*

MUNICIPAL CORPORATION — DAMAGE TO ABUTTING LOTS—ACTION. — 1. The owner of a lot abutting on an unimproved street of a city or village, in erecting buildings thereon, assumes the risk of all damage which may result from the subsequent grading and improvement of the street by the municipal authorities if made within the reasonable exercise of their power. 2. The liability of a municipality for injury to buildings on abutting lots exists where such buildings were erected with reference to a grade actually established, either by ordinance or such improvement of the street as fairly indicated that the grade was permanently fixed, and the damage resulted from a change of such grade, or where the building, if erected before a grade was so established, were injured by the subsequent establishment of an unreasonable grade. 3. Whether a grade be unreasonable or not must be determined by the circumstances existing at the time the grade was established, and not by the circumstances existing at the time abutting lots may have been improved. 4. Within the principle of municipal liability, as above stated, is the case where a lot is improved in anticipation of, and with reference to a reasonable future grade, which is afterward established, and damage results from a subsequent change in the grade. Judgment reversed and cause remanded for a new trial. Opinion by MCILVAINE, J. —*City of Akron v. Chamberlain.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1878.

[Filed January 22, 1879.]

HON. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" LUTHER DAY,
" T. Q. ASHBURN,
} Judges.

AN OWNER OF GROUND with whose consent an adjacent proprietor occupies a portion of his premises on which to build a joint wall, can not tear away such wall after a building has been erected thereon, upon the faith of his acquiescence in its location and construction. Opinion by WRIGHT, J.—*Miller v. Brown.*

JUDGMENT—REVERSAL— NEW TRIAL—WAIVER.—C recovered judgment against D in the court of common pleas. On error to the district court D obtained a reversal of this judgment and the case was remanded for a new trial. Without objection by C it was again tried in the common pleas, C being present prosecuting his action, and judgment was rendered in favor of D. Afterwards C, upon leave granted and upon the record of the district court, filed a petition in error in the Supreme Court to reverse said judgment of reversal. *Held*, that C by again prosecuting

his action on its merits in the common pleas to final judgment without objection, waives the right to prosecute error to reverse said judgment. Petition in error dismissed. Opinion PER CURIAM—*Collins v. Davis.*

FIRE INSURANCE—CONDITIONS—NOTICE — PRACTICE —DEMURRER—GENERAL ASSIGNMENT OF ERROR.—1. Where there is nothing in the terms of a policy of insurance which requires the truth of the representations in the application therefor to be averred as precedent to a right of action on the policy, a good cause of action may be made in an petition founded on the policy, without setting forth the application and averring the truth of the representations therein; but the falsity of such representations, where they are such as to invalidate the policy, may be set up by way of defense. 2. Where it is provided in a fire policy that the insurer, in lieu of paying for a loss in money, may rebuild or replace the property destroyed, such provision is in the nature of a condition subsequent, available only at the option of the insurer; it is, therefore, unnecessary to aver in the petition, in an action on the policy for the amount of the loss, that the insurer refuses to rebuild or replace the property destroyed. 3. Where a policy requires notice of a loss to be given to the insurer immediately after the fire, such notice is a condition precedent to a right of action on the policy; but in such action, under the provisions of section 121 of the code, it is a sufficient averment of the performance of the condition for the plaintiff to state in his petition that he has performed all the conditions on his part to be performed. 4. Although a demurrer to a petition for want of a material fact is erroneously overruled, if the fact is properly put in issue by the subsequent pleadings and the case is tried thereon, the judgment can not be reversed for error in overruling the demurrer. 5. The district court, on error pending therein, may, but it is not required, to consider errors in the record not assigned; therefore, a judgment of affirmance by the district court will not be reversed for error not assigned in that court. 6. The correctness of a verdict of a jury or finding of facts on the evidence, is not necessarily brought in review by a general assignment of error, that the judgment was rendered for the wrong party; to require such review, the overruling of the proper motion for a new trial must be assigned as error. 7. A general assignment of error, that the judgment was rendered for the wrong party, strictly raises only the question whether the proper judgment has been rendered upon the pleadings and findings of fact; but where all the evidence is properly embodied in the record, it necessarily raises the question of law as to whether there is any evidence tending to sustain the finding of facts; if there be such evidence, and the proper judgment has been rendered on the pleadings and facts found, where there is no other assignment of error, an affirmance of the judgment by the district court is not erroneous. 8. Where an agent of an insurance company acting within the general scope of the business entrusted to him as such agent, fills up in his own language an application for insurance from the statements of the insurer fully and truthfully made, receives the premium and issues a policy duly executed by the insurer on such application, the insurer will not be permitted, when a loss happens, to defeat the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured be chargeable with knowledge of his having exceeded his authority. Judgment affirmed. Opinion by DAY.—*Union Ins. Co. v. McGookey.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1878.

HON. GEORGE V. HOWK, Chief Justice.
" WILLIAM NIBLACK,
" HORACE BIDDLE,
" JAMES L. WORDEN,
" SAMUEL PERKINS,
} Associate Justices.

PLEADINGS IN EVIDENCE.—The pleadings in a cause are before the court, and constitute a part of its proceedings without being introduced in evidence. Admissions made in a pleading are denominated solemn admissions, or admissions *in judice*, and are not required to be supported by evidence. Such admissions are taken as true as against the party making them without further controversy. In this case, as the defendant's answer was already before the court as a portion of the pleadings, no error was committed in the refusal of the court to permit such answer to be formally read in evidence. Affirmed. Opinion by NIBLACK, J.—*New Albany & Vincennes Plankroad Co. v. Stallcup.*

APPEALS—PREPONDERANCE OF EVIDENCE.—This was an action of replevin for the recovery of a mare, begun before a justice of the peace and appealed to the circuit court. Finding for the plaintiff, and that the value of the mare was $100. WORDEN, J.: There was evidence tending to show that the mare was not worth more than $100. The justice had jurisdiction if her value did not exceed $200. The only point made in this court relates to the sufficiency of the evidence to sustain the finding of the court as to the value of the mare, as the question affected the jurisdiction of the justice. There may have been a preponderance of evidence showing that the mare was worth over $200. This court, however, does not decide cases upon the preponderance of the evidence. The primary functions of this court are the determination of questions of law, and not questions of fact. This court will, to be sure, set aside the finding of a court or jury which is unsupported in any material point by the evidence. But when there is substantial evidence in support of the finding or verdict, this court will not disturb it, though there may have been, in the opinion of the court, a preponderance of evidence against the finding or verdict. The numerous evils which would grow out of a system by which this court should decide causes appealed to it by what it might regard as the weight of evidence, are too apparent to need statement or exposition. Judgment affirmed. *Dean v. Dawson.*

PRINCIPAL AND AGENT—NEGLIGENCE IN FAILING TO RECORD MORTGAGE.—Appellee averred in his complaint that the appellants were real estate agents, and that he employed them to sell a dairy for him; that on February 20, 1873, they sold the dairy to one Bowers, and took his notes secured by mortgage for deferred payments; that the dairy was afterwards sold to one Collingwood, who agreed to pay the Bowers note; that Bowers' mortgage was left with appellants to have recorded, who undertook to procure it to be recorded within the proper time, and were paid for so doing, but they wrongfully neglected to have the mortgage recorded; that Collingwood sold the dairy, and that he and Bowers were both insolvent, etc. For special answer appellants alleged in one paragraph that appellee knew as early as March 10, 1873, that the mortgage was not recorded; that the property embraced in it was unincumbered, and still in the hands of Bowers as late as November 1873; that Bowers was willing to secure appellee by giving him a new mortgage, which appellee knew; that Bowers offered to re-convey to ppellee so much of the property as would indemnify

him, but appellee refused to receive it; that when Bowers sold the dairy to Collingwood it was still unincumbered, and Bowers offered to transfer it to appellee in satisfaction of his debt, but appellee refused to receive it. In another paragraph it was alleged that when Collingwood purchased the dairy of Bowers, appellee novated the debt by releasing Bowers and taking Collingwood in his stead, who undertook to pay appellee, and that, afterwards, appellee sued and recovered judgment against Collingwood, which could have been collected if suit had been brought sooner. Demurrers were sustained to these answers in the court below. *Held* (BIDDLE, J., delivering the opinion of the court), that neither paragraph was sufficient as a bar to the action. Each admits the plaintiff's right of action, but sets up nothing to avoid it. After the alleged wrong had been committed, and plaintiff's right had accrued, he was not bound to accept the property from Bowers, nor Collingwood's obligation; and, if he did so, it was no bar to the action; nor was he bound to pursue Collingwood on the judgment. After Bowers had sold the dairy to Collingwood, and appellee had lost his lien upon the mortgaged property, in consequence of the mortgage not having been recorded, he had no claim upon Bowers or Collingwood, and no remedy except against the appellants; and what B & C afterwards did with the property could not constitute a defense for appellants. Judgment affirmed.—*Stewart v. Muse.*

BOOK NOTICES.

REPORTS OF THE DECISIONS OF THE APPELLATE COURTS OF THE STATE OF ILLINOIS. By JAMES B. BRADWELL. Vol. I. Chicago: Chicago Legal News Co. 1878.

REPORTS OF CASES ARGUED AND DETERMINED in the Supreme Court of the State of Missouri. THOMAS K. SKINKER, Reporter. Vol. 66. Kansas City: Ramsey, Millett & Hudson. 1878.

It requires a volume of nearly 700 pages to contain the opinions of the appellate courts of Illinois in less than 100 cases. If the judges continue at the rate they have started, the reporter will have his hands full, and it will require all his industry to keep the succeeding volumes up to the standard of the one before us—the first of the series. It is, perhaps, a matter to be regretted, that when the opinions of the Supreme Courts of the States are published in such quantities that the busy lawyer can no longer attempt to follow them, the opinions of courts not of final resort should not be made as brief as possible, except in new and important cases. But that it is too much to hope for this, the volume before us sufficiently shows.

Among the few cases of general interest to be noted here are the following, viz:

A *mandamus* will not lie to compel a city council to admit a member. *Hildreth v. Heath*, p. 82. The charter of the city of Chicago provided that no person should be eligible to the office of Alderman who had been convicted of certain specified crimes. *Held*, that this did not constitute a disqualification, where the conviction had taken place in the United States court for an offense created by an act of Congress. *Ibid.* The commissions of a broker for the sale of real estate are due when he has found a purchaser who buys the property, and his right to such commissions is not affected by a modification or change of the terms of payment made between the buyer and seller different from the terms first given by the seller to the broker. *Lawrence v. Atwood*, p. 217. The pursuit of wolves or other animals *ferœ naturæ* and dangerous to mankind, does not excuse a trespass on another's land. *Glenn v. Kays*, p. 479. A common carrier is entitled to the exemption from garnishee process which the statute gives to public officers and their agents in the discharge of their official duties. *Mich. Cent. R. R. v. C. & M. L. S. R. Co.*, p. 399.

The sixty-sixth volume of the Missouri Reports is in size larger than the previous volume, and is a much better book in more than one respect. The reporter's work is excellent, and fewer typographical errors than in the sixty-fifth volume are to be found in this one. The head-notes could not be improved on, and the statements of facts at the beginning of each opinion have been carefully prepared.

While Mr. Bradwell's name appears on the back of his volume, in letters large enough for the primer of a young giant, the Missouri reporter modestly refrains from this unnecessary and often perplexing display. It has more than once been suggested to us, by members of the profession who have neither the time nor the inclination to familiarize themselves with the names of the everchanging State reporters, that some mention should be made of the confusion which this custom often creates. It is urged that the practice be discouraged by reporters, law-writers, and the makers of digests, and that the reports be cited as far as possible by the name of the State or court with their serial numbers. The practice of the present reporter of the Supreme Judicial Court of Massachusetts, whose attainments and position would certainly justify him in following the example set by the old reporters, is commended to the attention of reporters of courts of lesser dignity. We speak here only of the regular State reports. The case of special publications, such as the volumes of Woods, Dillon, Bissell, etc., may be said to form an exception to the rule which we have suggested; which we can not help agreeing with our correspondents should be adopted, and which should have but one other exception, viz: where the volumes contain something more than the mere transcripts of opinions with head-notes, a table of cases and an index. The most prominent example of this mode of reporting is met in the volumes of Mr. Stewart's New Jersey Equity Reports, a specimen of which may be found in this number of the JOURNAL, in the case of *Jewett v. Dringer*, and the exhaustive and learned note appended thereto

NOTES.

HON. JOHN CADWALADER, Judge of the United States District Court for the Eastern Dsstrict of Pennsylvania, died at Philadelphia on the 26th inst. of typhoid pneumonia, after an illness of only a week. The deceased judge was born April 1, 1805, and was the grandson of General John Cadwalader of Revolutionary fame. He was admitted to the bar September 30, 1825, and was appointed Judge of the United States District Court by President Buchanan in April, 1858, since which time he has occupied a seat on the bench of that court. He served one term in Congress.——The nomination of Thomas L. Nelson as United States District Judge for the District of Massachusetts has been confirmed by the Senate——The President has nominated Alexander B. Hagner, of Annapolis, Md., to the Supreme Bench of the District of Columbia, to fill the vacancy caused by the resignation of Mr. Justice Olin.——In *Lea & Perrins v. Deakin*, it has been recently decided by Drummond, J., in the United States Circuit Court for the Northern District of Illinois, that the word "Worcestershire," as applied to sauce, has become generic in meaning by constant use for a particular species of sauce, and where persons reside in Worcestershire, England, and manufacture there a sauce which they call "Worcestershire Sauce," they can not have the sole right to such application of the term.